UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

LONG BEACH MEMORIAL MEDICAL CENTER

Employer

and Case 21-RC-20583

CNA/USWA HEALTHCARE WORKERS ALLIANCE

Petitioner

Melissa P. Lopez, Attorney at Law
of Los Angeles, California
for the Employer

Jay Smith and Raja Raghunath, Attorneys at Law
for the Petitioner

Before: Tirza P. Castellanos, Hearing Officer

HEARING OFFICER'S REPORT AND RECOMMENDATIONS

The majority of the voting employees in the petitioned-for unit did not vote to be represented by the Petitioner for the purposes of collective bargaining. After the election, the Petitioner timely filed objections to conduct affecting the results of the elections. All parties were afforded a full and complete opportunity to be heard, to examine and cross-examine witnesses, to present evidence pertinent to the issues, and to file briefs after the conclusion of the hearing. The following constitutes my findings of fact with regard to the objections at issue in this proceeding. Based on the record presented at the hearing, I recommend that Petitioner's Objection Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18,

19, 20, 22, 23, 24, and 27 be overruled, and that a Certification of Results of Election be issued.

Procedural Background

Pursuant to a stipulated election agreement, an election by secret ballot was conducted on March 12 and 13, 2003, among three separate units of employees, Units A, B and C. The Petitioner received a majority of the valid votes cast in Units B and C. Therefore, the only bargaining unit involved in this matter was listed as Unit A.[1] The polls for all units were open from 6:00 a.m. to 8:00 a.m., 2:00 p.m. to 5:00 p.m., and 6:00 p.m. to 8:00 p.m.

The tally of ballot, for Unit A, which was served upon the parties immediately following the election, showed that of approximately 353 eligible voters, 136 cast ballots for, and 140 against the Petitioner.[2] The Hearing into this inquiry was conducted on May 12 through 16, 19, 22 through 23, and May 28, 2003.

[1] All full-time, regular part-time and per diem (resource) [Per diem employees are eligible to vote if they "regularly" averaged four (4) hours or more of work per week within the meaning of Davison-Paxon Co., 185 NLRB 21, 24 (1970) and its progeny, during the 14-week period preceding the payroll eligibility date.] licensed technical employees, including Radiation Therapy Technologists, Dosimeterist, Rad Tech Special procedures/CT/Mammo, Rad Tech Special Procedures D-Rads, LVNs, Resp Care Practitioners II, Ultra Sound Techs, Ultrasound Tech Leads, Resp Care Practitioners III, Polysomnographic Techs I, Polysomnographic Techs, Polysomnographic Tech Leads, Limited X-Ray Techs, Pharmacy Techs, Pharm Tech Leads, Pharm Techs III, Pharm Techs I, Pharm Techs II, Histology Technicians (W/O Ht), Histology Techs Sr, Histology Nuclear Med Techs, Coord Clinical Instructor Rads, Spec Proc/CT Rad Tech Leads, Rad Technologist Leads, Perfusionists, Perfusionist Leads, Rad Techs I Sr, Rad Tech, Rad Technologists Sr. and Rad Therapy Tech Leads employed by the Employer at its facility located at 2801 Atlantic Avenue, Long Beach, California; excluding all professional employees business office clerical employees, other nonprofessional employees, skilled maintenance employees, guards and supervisors within the meaning of the Act.

[2] There were no void ballots and seven challenged ballots, which were sufficient in number to affect the results of the election. Thereafter, the parties entered into a Stipulation resolving three of the seven challenges. The Region subsequently issued a revised tally of ballots. The remaining four challenged ballots were insufficient in number to affect the results of the election.

Preface

It is noted that the recitation of facts in this report is, unless otherwise noted, based on a composite of the credited aspects of the testimony of all witnesses, refuted testimony, supporting documents, undisputed evidence, and careful consideration of the entire record, including the parties' post-hearing briefs.

Although each iota of evidence, or every argument of counsel, is not individually discussed, all matters have been considered. Omitted matter is considered either irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative value. Unless otherwise indicated, credibility resolutions have been based on my observations of the testimony and demeanor of witnesses at the hearing. 3-E Company v. NLRB, 26 F.3d 1, 3, 146 LRRM 2574, 275 (1st Cir. 1994); NLRB v. Brooks Camera, Inc., 691 F.2d 912, 915, 111 LRRM 2881, 2883 (9th Cir. 1982); NLRB v. Ayer Lar Sanitarium, 436 F.2d 45, 49, 76 LRRM 2224, 2226 (9th Cir. 1970). Failure to detail all conflicts of testimony does not mean that such conflicting testimony was not considered. Bishop and Malco, Inc. d/b/a Walkers, 159 NLRB 1159, 1161 (1966). Furthermore, the testimony of certain witnesses has only been partially credited. Kux Manufacturing Co. v. NLRB, 890 F.2d 804, 132 LRRM 2935 (6th Cir. 1989); NLRB v. Universal Camera Corp., 179 F.2d 749, 754, 25 LRRM 2256 (2nd Cir. 1950), *rev'd on other grounds*, 340 U.S. 474, 27 LRRM 2373 (1951).

Board Standards

"[B]allots cast under the safeguards provided by Board procedures [presumptively] reflect the true desires of the participating employees." NLRB v. Zelrich Co., 344 F.2d 1011, 1015 (5th Cir. 1965). Thus, the burden of proof on parties seeking to have a Board-supervised election set aside is a "heavy one." Harlan #4 Coal Co. v. NLRB, 490 F.2d 117, 120 (6th Cir. 1974), cert denied, 416 U.S. 986 (1974); see also NLRB v. First Union Management, 777 F.2d 330, 336 (6th Cir. 1985) (per curiam). This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." NLRB v. Bostik Div., USM Corp., 517 F.2d 971, 975 (6th Cir. 1975) (quoting NLRB v. White Knight Mfg. Co., 474 F.2d 1064, 1067 (5th Cir. 1973).

The standard to determine if pre-election conduct warrants the overturning of an election depends, in part, on who committed the acts. Acts by a party, or by an agent of a party, which have a tendency to interfere with employees' freedom of choice, will cause an election to be overturned. To determine if such tendency to interfere with employees' freedom of choice has been established, the Board, as set out in Harsco Corp., 336 NLRB No. 9 (2001) considers:

(1) the number of incidents;
(2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit;
(3) the number of employees in the bargaining unit subjected to the misconduct;
(4) the proximity of the misconduct to the election
(5) the degree to which the misconduct persists in the minds of the bargaining unit employees;
(6) the extent of dissemination of the misconduct among the bargaining unit employees;

(7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct;
(8) the closeness of the final vote; and
(9) the degree to which the misconduct can be attributed to the party.

The test for evaluating a party's pre-election conduct is an objective one. "The law is clear that the subjective reactions of employees to alleged threats are irrelevant to the question of whether there was in fact objectionable conduct. [R] ather, the test is based on an objective standard." Cambridge Tool Mfg., 316 NLRB 716 (1995).

For conduct to be objectionable, it must occur during the critical period from the date of the filing of the petition. Ideal Electric and Manufacturing Co., 134 NLRB 1275 (1961). However, pre-petition conduct can be considered insofar as it lends meaning and dimension to conduct, which occurred during the critical period. Shamrock Coal CO., 267 NLRB 299, 310 (19982); Dresser Industries, 242 NLRB 74 (1974).

Objection No. 1

During the critical period, the Employer granted employees improved pension benefits. The Petitioner alleges that the announcement of these improvements to the employee retirement plan occurred during the critical period, influenced voters by the fear that they would lose any pension if they voted for the Petitioner, and that they would get the pension if they did not.

The Petitioner, HealthCare Workers Alliance (herein the "Alliance" or the "Union"), is a joint venture between the California Nurses Association (herein "CNA") and the Steelworkers of America. The CNA currently represents all of the RNs at the Employer's facility. The task of organizing the remaining employees, ancillary, was undertaken by the "Alliance."

During the proceeding, an issue arose concerning when the Employer learned of the Petitioner's campaign to organize the ancillary employees (Units A, B, and C) in relations to Employer's announcement, on or about February 2003, of a new retirement plan. The Petitioner contends that the Employer knew of its effort to organize the ancillary employees as early as April 2002, when it opened an office near the Employer's facility. The Employer denies having knowledge of this activity until the last months of 2002.

As a result, review of this objection is divided into the Employer's knowledge of the campaign and thereafter, the timing of its announcement of the new benefit.

I. The Employer's Knowledge of the Union Campaign

Petitioner's Evidence

The Petitioner called numerous witnesses to testify concerning the Employer's knowledge of the campaign including Bill Gallagher, Glennis Golden-Ortiz, Corey Bennett, Leland Hylton and Roy Hong.

Bill Gallagher

Gallagher has been employed by the CNA since September 8, 2000 and he began his affiliation with the CNA/USWA Healthcare Workers Alliance in or about January 2002. Gallagher testified that during the spring or summer of 2002, the Union collected authorization cards from the ancillary employees. By September 2002, the Union had gathered about 900 to 1000 authorization cards.

According to Gallagher, the Petitioner established an office in or about April 2002 which is located 10 blocks from the Hospital on the same street, and mounted a sign

outside which can be easily seen from the street.[3] In connection with the organization of the ancillary employees, Gallagher testified that he printed new business cards in April 2002, and distributed the cards during the campaign to organize the ancillary employees.[4] Gallagher denied using any other business card after April 2002 and testified that he ceased organizing the RNs after April 2002. Gallagher also noted that in May 2002, he and a delegation of housekeeping employees went to speak to Executive Director of Human Resources Ron Chavira at his office.[5] Chavira's secretary advised them that he was unavailable, thus they never actually met with him.

Gallagher testified that on August 23, 2002, one of the Petitioner's organizers went to the hospital to distribute a flyer, Petitioner's Exhibit No. 8, but was arrested at the Employer's behest. Gallagher further testified that Union Organizer Glennis Golden-Ortiz was present at the Hospital that day as well and distributed the same flyer. Gallagher claims that about 5,000 copies of Petitioner's Exhibit No. 8 were printed and approximately 2000 were distributed on that day.[6]

Gallagher noted that on December 29, 2002, he stopped by the Hospital to inspect the leafleting near the Labor and Delivery entrance, at which time a security guard and Vice-President Pat Johnner complained that union handbillers were blocking patient egress and ingress.[7] Gallagher testified that Johnner asked him when they were going to have their election and that he was sick and tired of the campaign as it had caused a

[3] Petitioner's Exhibit No. 46 is a photograph of the sign.
[4] Petitioner's Exhibit No. 45.
[5] The housekeeping employees are not in Unit A.
[6] Gallagher also provided testimony that a few days after the distribution of Petitioner's Exhibit No. 8, Labor and Delivery LVN Debbie Caballeros told him that she was upset and scared because her department manager posted the August 23, 2002 flyer above the manager's desk. I do not give any weight to this testimony because it is hearsay and the Petitioner did not present Caballeros to testify regarding the posting of this notice.
[7] In its brief the Petitioner cited this incident as having occurred on December 9, 2002. Gallagher's testimony, however, refers to this incident with Johnner as having taken place on December 29, 2002.

tremendous strain on him and Hospital security. Gallagher acknowledged that CNA organizers were also on Hospital property after November 2001 and through March 13, 2003 for the purposes of dealing with the RNs. Gallagher further testified that in October and November 2002, CNA increased its presence at the hospital because of the two RN strikes that occurred.

Glennis Golden-Ortiz

Ortiz, a CNA Organizer, testified that on or about April 8, 2002, she distributed Petitioner's Exhibit No. 7, a union flyer, to employees on that day and for a week thereafter. She also testified that on or about August 23, 2002, she distributed Petitioner's Exhibit No. 8, another union flyer, to employees. On or about October 21, 2002, Ortiz claims to have distributed union flyer marked as Petitioner's Exhibit No. 9. In addition, Ortiz noted that the distribution of this flyer occurred simultaneously during the first RN strike. Ortiz further testified that during the first RN strike, many ancillary employees were on the picket line, on Atlantic Boulevard, supporting the RNs. Ortiz stated that management was on the roof of the Hospital looking down upon the picket line and that all of the employees were pointing to management and waving. Ortiz, however, was unable to identify which managers were on the roof observing the employees union activities.

Additionally, in November 2002, Ortiz claimed to have distributed Petitioner's Exhibit Nos. 10 and 11, which were also union flyers and that Vice-President Pat Johnner took flyers from her and stated that he was supposed to give them to Human Resources. Ortiz also testified to distributing a number of other flyers after November 2002 and that

Johnner either spoke to her or acknowledged her presence at least 20 times prior to the election.[8]

Corey Bennett

Bennett, an active union supporter, testified that he began wearing a 3-inch in diameter union button that said "Healthcare Workers Alliance," and other Union paraphernalia in October 2002. The first union item that he wore was a red and white lanyard, which was visible after the first time someone viewed it up-close. Bennett saw other employees wear those lanyards on a daily basis inside and outside the Hospital in October 2002 and throughout November and December. Additionally, he saw other employees wear Union insignia between the two nurse's strike, mid-October and mid November 2002. Bennett noted that during the first nurse's strike in mid-October, employees only wore CNA insignia and they subsequently began to wear Healthcare Workers Alliance insignia. He also stated that in the autumn of 2002, no Hospital manager or executive said anything to him about the Union.

Leland Hylton

Hylton, a Senior Radiological Technologist in the Imaging and Services Department, testified that he began to wear a union lanyard around his neck when it was first distributed by the Union. He could, however, not recall when the Petitioner first distributed these lanyards.

Hylton testified that on or about August 23, 2002, he received a flyer from a union representative outside of the Outpatient Surgery as he was on his way to work.[9] He testified that he received another flyer on or about October 21, 2002 again outside of

[8] Petitioner's Exhibit Nos. 12, 13, and 14.
[9] Petitioner's Exhibit No. 8.

Outpatient Surgery.[10] According to Hylton, he would receive flyers as he was coming into work at 6:30 a.m. or 7:00 a.m. In addition to these, he received flyers on or about November 11, 2002, and January 1 and 20, 2003.[11] He further noted that he would see flyers lying around on the counter of his workplace.

Roy Hong

Hong has been employed by the CNA since January 2, 2001 and was involved in collective bargaining between the CNA and the Hospital concerning the RNs. Hong testified that subsequent to bargaining sessions on February 2002, the Hospital had granted CNA's request to use several conference rooms throughout the Hospital. Hong testified that in or about October 2002, Memorial Health Services Senior Vice President of Human Resources Patty Ossen informed CNA that they could not use a conference room because the Employer believed that the Petitioner had been going into conference rooms designated for CNA use.[12]

Employer's Evidence:

Several Employer witnesses provided testimony concerning their knowledge of the Petitioner's efforts to organize the ancillary employees.

Patty Ossen

Ossen is Senior Vice-President of Human Resources for Memorial Health Services (herein "MHS"), which is an acute care provider that owns five hospitals in Southern California. Long Beach Memorial Medical Center and Miller Children's

[10] Petitioner's Exhibit No. 9.
[11] Petitioner's Exhibit Nos. 10, 11, and 12.
[12] The testimony is unclear as to whether Patty Ossen actually spoke to him directly or Hirsch on this issue, whether Hart was repeating what Ossen allegedly said and whether Hong heard anything first-hand period.

Hospital are among the five.[13] Ossen is responsible for the designing and developing of employee benefits, compensation plans, employee relation's management, training and education and all day-to-day human resource functions for the hospitals in MHS.[14] Ossen does not work out of the Employer's facility nor does she have an office at that facility.

Ossen testified that she did not learn that the Union was organizing the ancillary employees until after the CNA contract was ratified in January 2003. She noted that she suspected such employees were being organized because of the large scale of union organizing at the Hospital for the past three years, however, she was not certain that the ancillary staff was being organized. Ossen testified that as she is employed by MHS, She noted that she did not attend any of the day-to-day hospital operational meetings in the Hospital nor have an office located at the Hospital. She testified that in 2002, her primary focus was on negotiating the CNA contract and revising the pension plan, making a variety of benefit changes throughout the MHS system, and not on any new organizing efforts that may have been occurring at Long Beach Memorial Medical Center (herein "LBMMC"). Ossen testified that that she felt there was organizing going on at all levels for the past three years and would make the same assumption for any hospital in Southern California, however testified that to what extent she did not know. She reiterated that she was solely focused on the RNs and not on any other group of employees at the Hospital. She further noted that during the time of two RN strikes, there was a lot of Union propaganda around the Hospital. She stated that did not always receive or see copies of what the Union did.

[13] Unit A employees are employed at both Long Beach Memorial and Miller Children's Hospital.
[14] She reports to the Executive Vice President and Chief Operating Officer of MHS, Fran Hanckel, and to the President, Barry Arbuckle. The CEO's from all five hospitals within MHS report to Hanckel. All of the executive directors of human resource report to Ossen.

During cross examination, she further noted that during the period of the Town Hall meetings in December 11 and 13, 2002 she was unaware that the non-RNs were organizing with the theme of "We Deserve No Less." During cross-examination, Ossen acknowledged having received an unfair labor practice charge filed by the Petitioner in or about November 2002, which among other things, noted that Alliance Organizer Esperanza Leyva had been arrested. Ossen then stated that although she had known of the Alliance for several months, she was not officially aware of them until the charge in November.[15]

In response to Union Witness Roy Hong's assertion that Ossen was aware of the ancillary campaign in October 2002, Ossen testified that it was in November 2002 and not October 2002, when she denied access to the CNA for use of conference rooms in connection with collective-bargaining negotiations. According to Ossen, the denial arose out of concerns of repeated CNA violations of the Employer's no-solicitation policy in patient care areas.[16] Additionally, Ossen testified to an incident where Roy Hong scheduled an unauthorized and unsanctioned meeting in the employee cafeteria during RN work hours and RNs walked off of the job in order to attend. As a result of these incidents, counsel for the Employer wrote to the CNA advising of the Employer's denial for future access to conference rooms.[17] Ossen further denied ever mentioning to either Union Organizers Roy Hong or Diane Hirsch-Garcia that denial of the conference rooms was based on use by the Health Care Workers Alliance organizers.

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[15] This testimony specifically referred to her having knowledge of the organization in and of itself, and not of the activities it may have had with the Hospital's ancillary employees.

[16] In its brief, the Petitioner suggests that Ossen was referring to repeated violations by the "Alliance," however; the transcript reveals that she was referring to repeated violations by CNA and not any other labor organization.

[17] Employer's Exhibit No. 34 is the letter that was sent. The letter substantiates that the CNA was advised that the reason for the denial was based on their repeated violations of company policy.

Executive Director of Human Resources Ron Chavira

Chavira has served as the Executive Director of Human Resources for Long Beach Memorial Center (LBMM) and Miller Children's Hospital (MCH) for approximately 16 months. His duties include the day-to-day Human Resources operations of both LBMM and MCH.

Chavira stated that he was familiar with the Hospital's response to the Union campaign in February and March 2003. In this regard, the Hospital educated managers on what to do and what not to do. The goal was to have an informed election.

Chavira testified that he became aware that the ancillary employees were being organized by the Petitioner around the beginning of October 2002 through a flyer that someone put on his office chair.[18] Chavira stated that he threw the flyer away and did not report it to anyone because the flyer was dated August and it was already October. Chavira testified that he assumed that LBMC CEO Byron Schweigert and MHS Senior Vic-President of Human Resources Patty Ossen already knew about it, but he asked Director of Labor Relations Jonathan Berke, who reports to him, whether he had placed the flyer on his chair.[19] Berke replied that he had not.

With respect to Union Agent Gallagher's testimony that he and housekeepers went to Chavira's office, Chavira testified that sometime in 2002, he was paged by an office clerk and advised that a group of housekeepers wanted to meet with him. Chavira was out to lunch at the time and instructed the clerk to have the housekeepers schedule an appointment. The housekeepers did not leave anything for Chavira, nor did they ever

[18] Petitioner's Exhibit No. 8, which is dated August 23, 2002.
[19] Chavira testified that to date, he has never asked Shweigert or Ossen when they found out about the campaign.

schedule an appointment.[20]

Director of Labor Relations Jonathan Berke

Berke has been the Director of Labor Relations since the end of 2001. His duties consist of assisting management in the administration of the CNA Union contract, respond to grievances, assist Ron Chavira with any labor relations issues, and assist in recent Union elections.

Berke testified regarding a conversation with Union Organizer Bill Gallagher. He was unable to recall the date. Gallagher was distributing union materials as Berke was driving into the employee parking lot. Berke asked Gallagher whether he was handing out union oriented material to cars that were driving in. Berke testified that Gallagher asked, "What are you talking about?" Berke referred back to the materials that Gallagher was handing to the cars that were passing by. Gallagher then said, "I don't know what you are talking about" as he handed a handbill to the car on the other side of Berke. Berke then told Gallagher that he was violating the Hospital's no-solicitation policy by distributing the material on Hospital property and he asked Gallagher to leave. Berke testified that he did not know whether Gallagher was targeting the ancillary staff at the time and that he did not actually see the flyer that Gallagher was distributing. Berke did

[20] Chavira testified that he first met Union Organizer Bill Gallagher in late September or early October 2002 when he saw Gallagher sitting in the main lobby of Hospital with a stack of flyers and a big backpack. When, Chavira approached him and asked what business he had in the Hospital, Gallagher replied that he was waiting for an RN to come down to get some information from him. Gallagher gave Chavira a business card (Employer's Exhibit No. 33). Chavira testified that the business card that Gallagher gave him only had a CNA logo. Chavira further denied ever seeing Petitioner's Exhibit No. 45, which is the "Alliance" business card that Gallagher claims to have exclusively used after April 2002. Chavira further testified that at the time that he believed Gallagher to be employed by CNA. This testimony directly contradicts Gallagher's assertion that he only distributed "Alliance" business cards after April 2002.

not recall Gallagher stating anything to the effect that "he should stop lying to ancillary employees about the Alliance." [21]

Berke does not recall the exact time that he first had knowledge about the Union organizing the ancillary staff. He stated that he was not aware before Halloween or Thanksgiving, but that he was probably aware of the organization of these employees before Christmas 2002. Berke stated that he does not recall if he saw Petitioner's Exhibit No. 8 in August 2002. In regard to the Alliance office, Berke testified that he only recently found out of it being located on Atlantic Boulevard. He has never seen the sign identifying the office from the street. He only discovered that it was located on Atlantic Boulevard because of a letter that he had to send to an Alliance Organizer.

With respect to union flyers, Berke stated that managers sometimes brought him copies that came into their possession and that he did not dissuade them from doing so. He would normally read the flyer, make copies of it and then distribute it to his Human Resources colleagues, Ron Chavira, and Patty Ossen. Berke did not keep an organized file of these flyers.

Berke testified that his understanding is that the HealthCare Workers Alliance is a joint venture between CNA and the Steelworkers of America. Berke denied knowing that at some point before the Alliance, the Steelworkers had probed ancillary employees about organizing. According to Berke, the Hospital hired former Steelworker Organizers as Consultants in 2003. He believes that Rick Torres, one of the consultants, told him that he had previously been organizing the Hospital's employees but Torres did not say the

[21] In his testimony, Bill Gallagher did not address this incident. Other than the inquiries during Berke's cross-examination, the Union did not submit any evidence concerning this conversation.

"ancillary employees." Berke did not know whether the Steelworker Organizers ever participated in the organization of the ancillary employees for the Alliance.

Berke testified that in respect to Petitioner's Exhibit No. 40, a letter informing him of the Petitioner's intent to distribute flyers on November 21, 2002, he recalls receiving the document but not the date. He vaguely remembered Gallagher calling him before Petitioner's Exhibit No. 40, but could not be sure whether Gallagher did so before or after he received the document.

Manager of Imaging Services Julie Lane

Lane testified that she became aware of her Unit A employees being approached by the Petitioner on or about October 2 or 3, 2002 when a CT Technologist e-mailed her that union organizer Glennis Golden Ortiz was in the CT scanners where patients were located and she refused to leave the patient care area. Lane reported this incident to the Director of Imaging Terri Ashby. Ashby advised her to call security. Ashby also told Lane that she had sent e-mail to Human Resources.

Lane stated that she had seen Union flyers in work areas of her department. In regard to Petitioner's Exhibit No. 8, which is dated August 23, 2002, Lane recalled seeing it, but could not recall if it was before or after the incident with Ortiz.

According to Lane, she had not received any guidance from the Hospital regarding the Petitioner prior to the incident with union organizer Ortiz. The Hospital, however, addressed the Petitioner's organizing efforts in mid-January 2003, when it conducted a meeting concerning the ancillary employees and at which time it advised managers on how to respond to the organization campaign.

Manager of Invasive Cardiology Derek Lester

Lester testified that he saw union flyers all over the workplace. However, Lester noted that although it could very well have been in August or September 2002, he believes he first saw those flyers later than those months. With respect to Petitioner's Exhibit No. 8, which was purportedly distributed in late August 2002, Lester testified that he did not recall if he had ever seen this particular flyer in the Catheterization Laboratory, which he supervises, and that Petitioner's Exhibit No. 8 was much bigger than the flyers he had seen.

Communications Manager Suzie Beach

Beach testified that she did not become aware that the ancillary employees were being organized by the Union until after the second RN strike in December 2002. She further noted that she was not aware of ancillary employees being organized in October 2002, when the first RN strike occurred.

II. The Pension Plan Decision, Timing of Announcement [22] and Alleged Effect.

Petitioner's Evidence:

The Union called several employee witnesses to testify regarding announcements of the pension plan throughout the campaign and the alleged effect of these announcements on the election.

Corey Bennett

Bennett testified that during the week of the election, in March 2003, he saw Joint Exhibit No. 43, which was distributed by the Employer. It was dated March 10, 2003 and titled, "The Truth About The Pension Plan." Bennett provided hearsay testimony that when this flyer was distributed, Pharmacy Tech employee Margaret Cordova told

[22] I take administrative notice that the petition in this matter was filed on January 30, 2003.

him that "because they were going to get the pension anyway, she was not going to vote for the Union." [23]

Christina Kaiser

Kaiser, a 9-year Respiratory Therapist at the Hospital, testified that about February 2003, she received a letter at her home, which announced the Hospital's new retirement plan.[24] After this letter, she received flyers in her mailbox that mentioned the improvements to pension benefits, including one on March 10, 2003.[25] In addition, she attended one informational meeting held by the Employer where it was stated that the same pension plan that the nurses were receiving would be available to non-union employees as well because the Hospital did not want to have two retirement plans.[26] She attended a Respiratory Therapist meeting where approximately five employees from Unit A were present. Kaiser provided hearsay testimony that during this meeting, Unit A Respiratory Therapist Saul stated that he knew of quite a few neo-natal therapists that would not vote for the Union because they know they will get the pension plan and that if the Hospital was promising the pension plan, they would not vote for the Union.[27]

Kaiser further provided hearsay testimony that sometime before the election, during the afternoon, in the hallway of the Neonatal Intensive Care Unit, employee Clyde Murray told her that he would not vote for the Union because he did not want to pay

[23] Although the Union argues that this is not hearsay testimony, I do not give any weight to this testimony inasmuch as no direct evidence was presented, and the possible subjective opinion of Ms. Cordova is of no probative value due in this proceeding.
[24] Joint Exhibit No. 43 titled "MHS Introduces New Memorial Care Retirement Plan."
[25] Joint Exhibit No. 24 titled "Facts Matter" "The Truth About the Pension Plan."
[26] The date of this information meeting is unknown.
[27] The Petitioner insisted that this was not hearsay testimony as it was only being offered to note that this witness heard the comment.

union dues if the Hospital was going to guarantee employees a pension plan. Nobody overheard this conversation and she did not repeat it to anyone.[28]

Leland Hylton

Hylton testified that on or about March 10, 2003, he received a flyer from the Employer.[29] The flyer was titled "The Truth About The Pension Plan" and advised employees that they did not need to vote for the union to participate in the plan. Hylton also provided hearsay testimony that one or two weeks before the election, after employees had received Joint Exhibit No. 43, Unit A Ultrasound Tech Mavis McDonnell told him, "Why do I need to vote for the Union, pay dues, if the Hospital is going to give us the retirement plan that they gave the nurses?"[30] Hylton also stated that McDonnell had been supportive of the Union after the CNA contract signing in or about January or February 2003 and he knew this because of discussions with her.

Patrick Rowan

Rowan provided testimony that Unit A employee Julie Hawk told him prior to the election and after getting a pension plan newsletter in March 2003, "What is the point of voting for the Union if we are going to get this pension anyway, why wreck it by disrupting things?" Rowan believes that other Unit A employees were present when Hawk stated this to him.[31]

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[28] I afford no weight to this testimony for the reasons stated in footnote 17.
[29] Joint Exhibit No. 24.
[30] I give no weight to this testimony. Not only did the union fail to present McDonnell as a direct witness, but also the testimony is subjective in nature and is of no relevance to this proceeding.
[31] The Employer presented Julie Hawk as a witness for other objections in this proceeding. During her cross-examination, she stated that she mentioned to some co-workers that she had a negative perception of the Union. However, Hawk was never asked whether she discussed the pension plan itself or her views concerning the pension plan with Rowan or any other employee. Inasmuch, I do not give any weight to this testimony.

Employer's Evidence:

The Employer called MHS Senior Vice-President of Human Resources Patty Ossen to testify concerning why the decision was made to change the pension plan and also to explain the timing of the announcement.

Ossen testified that as of January 2002, there was a pension plan that applied to all employees within the five hospitals in MHS, including the staff at Long Beach Memorial Medical Center and Miller Children's Hospital. The pension plan was known as Memorial Employees' Retirement Income Trust (herein referred to as "MERIT"), and which is governed by the ERISA regulations.[32] Ossen stated that the plan administrator has total responsibility for maintaining and administering the plan.[33]

Ossen testified that the MERIT plan changed three times in 2002. The first change consisted if the vesting schedule for all employees from a 7-year vesting to a 5-year vesting effective July 1, 2002. The decision was made by the MHS Finance Committee in June 2002 and was due to a legislative requirement.[34] Notices of the change were sent to employee homes and printed in various employee newsletters. The change applied to all employees within MHS.

A second change was made to the plan in September 2002 concerning the Employer's contribution to the plan. The change was an increase of the Employer

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[32] Employer's Exhibit No. 19 is the MERIT plan that has been in effect since January 1st, 1999 and which was in effect January of 2002. Employer's Exhibit No. 20 is the Summary Plan Description (SDP) that goes with Employer's Exhibit No. 18. The Summary Plan Description is a consolidation of what is in the plan document that is distributed to employees and easier for them to understand.

[33] The MHS Finance Committee is the plan administrator for the merit plan. Additionally, the plan administrator is responsible for making decisions regarding plan changes or amendments. If they approve that a change be made, they take that recommendation to the MHS Board of Directors for final approval. The MHS Finance Committee and the MHS Board of Directors meet once a month with the exception of August and December, which are the two months in which the boards take vacation. Normally the MHS Board of Directors meets one day after the MHS Finance Committee meets.

[34] Employer's Exhibit No. 21 is a memo dated June 2002 and is a "Summary of Material Modification" of the pension plan.

contribution from a 1% to 5% deposit to a 3% to 7% deposit. Ossen testified that there were a couple of reasons for this change. One had to do an annual survey, which was mailed out, to all MHS employees in May 2002 with results returning in June 2002.[35] Data entry clerks who were hired by a department of MHS specifically to score the survey information tabulated the survey. The results were thereafter presented to each of the boards of directors of the five hospitals within the MHS system. Additionally, the results were mailed out to all MHS employees. One of the questions on the survey concerned the employee retirement plan. The results indicated that employees throughout MHS, and not just at Long Beach Memorial Center, were dissatisfied with the current pension plan.[36]

According to Ossen, after reviewing the results of this survey, about the middle or end of July 2002, Ossen ordered an updated the market analysis that had previously been conducted in March 2002.[37] Specifically, Ossen requested that several healthcare providers within MHS' geographical area be contacted in order to compare their benefits. The market analysis was completed in August 2002 and the results indicated that the MHS pension plan was not competitive. Ossen testified that she took the survey results to each of the boards of the five hospitals within MHS and advised that she would return with recommendations on how to improve employee benefits. Additionally, Ossen testified that in August 2002, she collated all of the information and recommended to her

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[35] Employer's Exhibit No. 22 is the Employee Survey, which was mailed to all 8,400 employees within MHS. Employer's Exhibit No. 23 are the Survey Results with composite scores indicating how all MHS employees felt as a whole, as well as the scores for just Long Beach Memorial and Miller Children's Hospital. Ossen noted that this type of survey was conducted in the past, but that he only two that were identical was for the years 2001 and 2002.

[36] Page 3, question No. 58 on Employer's Exhibit No. 22 indicates the question that concerns the pension plan. The answers given by MHS employees are contained on Page 2, No. 58 on Employer's Exhibit No. 23.

[37] Ossen testified that MHS conducts market research a couple of time a year.

superiors, Frank Hanckle and Barry Arbuckle, that the employee retirement plan be enhanced to become more competitive. Ossen claims that Arbuckle asked her to prepare a report with supporting documentation to present to the MHS Finance Committee in September 2002.

Ossen testified that she presented that report to the MHS Finance Committee in September 2002 because they did not meet in August (a black-out vacation month). In that meeting, she reviewed the survey material and market data results.[38] Ossen claims that she told the MHS Finance Committee that based on the employee survey, the market survey data, and their average contribution to the retirement plan, MHS needed to address the plan and increase it. Additionally, Ossen showed the committee a document that reflected what MHS contributed to the retirement plan for the past ten years.[39] Ossen testified that she recommended that MHS change the minimum funding from 1% to a new minimum of 3% and increase maximum funding from 5% to a new maximum of 7%. In addition, she noted that she would be back to speak to them again regarding a retirement plan redesign by the end of the fiscal year. Thus, the committee approved the recommendation to improve the MHS retirement plan and they made it retroactive to July 1, 2002.[40] All MHS employees were notified of this change on or about September 25,

[38] Ossen presented Employer's Exhibit No. 24 to the MHS Finance Committee. It contains information on how the MHS retirement plan compares next to the industry norm and other hospitals. Under the MHS column, it shows that their employer contribution was less than 3% of base pay. The second column are the results of the healthcare industry. According to Ossen, the information on the survey which indicated that 1,136 employers participated in, was derived from a survey conducted by Watson Wyatt, a private consulting firm. Although MHS completed the survey in the fall of 2001, they did not receive the results until 2002. This was the only time that MHS had participated in the industry wide survey by Watson Wyatt. However, she also stated that MHS has participated in several other benefit surveys with the Hospital Council of Southern California. In this regard, Ossen noted that benefit surveys tend to be complex and costly and as a result are conducted maybe every two years.

[39] Employer's Exhibit No. 25.

[40] After they approved the plan, the finance committee made the recommendation to the MHS Board of Directors the following day and the Board of Directors ratified the recommendation and applied the change to <u>all</u> employees within MHS.

2002, through a letter that President Barry Arbuckle sent.[41]

Ossen testified that during the September 2002 meeting, she told the MHS Finance Committee that she would be returning concerning the MHS retirement plan because they were not only out of sync with the market, but they were also receiving a lot of pressure from the CNA during bargaining negotiations to enhance or change their retirement plan for the RNs. According to Ossen, this issue arose during contract negotiations between the CNA and Long Beach Memorial Center in June 2002. The CNA wanted Long Beach Memorial Center to change its retirement plan and accept the Steelworkers defined pension plan. However, MHS refused to have employees be members of the Steelworker pension plan. As a result, a final change was made to the entire MHS pension plan in December 2002.

On December 4, 2002, Ossen made a recommendation again to senior leadership within MHS regarding the pension plan for the RNs.[42] The recommendation was to change the employee deposit to a fixed deposit based on employee seniority and additionally, that those funding levels be from 4% to 9% of the total gross payroll. According to Ossen, everyone liked the proposal, however, because it was December (the second month blocked out for vacation), neither the MHS Finance Board nor the MHS Board of Directors was scheduled to meet that month so a final approval could not be ratified at that time by MHS. Notwithstanding, an oral "pre-approval" was given by the

[41] Joint Exhibit No. 40 is the letter announcing the increase to the retirement plan. The memo attached to the exhibit is a letter of explanation to employees relating to the changes.

[42] The reason for meeting on this date was due to an upcoming contract negotiation session with the CNA on December 7, 2002 at the Federal Mediation Office. According to Ossen, they had not met recently with the CNA and the pension was still a "hot" issue as the RNs had gone on strike twice over the issue. Ossen claims that she wanted to put on the table a defined contribution plan.

individual MHS Board members. Thereafter, on December 6, 2002, Ossen was authorized to present the revised pension plan to the CNA.[43]

On December 7, 2002, Ossen presented a document to the CNA that detailed MHS' pension plan proposal.[44] This was the same proposal she had discussed with MHS Leadership on December 4, 2002. Ossen noted to the CNA that they had only received a verbal approval from MHS Board of Directors because it was not scheduled to reconvene until January and that the proposal still needed ratification. CNA accepted the proposal and gave MHS 60 days to ratify the proposal. Ossen testified that when MHS presented the revised pension plan, she reiterated that the change would apply to 100% of eligible employees within MHS. Thereafter, on December 9 and 10, 2002, the CNA took the proposal to the RNs where they voted and accepted the contract that included the pension changes.[45]

Ossen stated that it was an ongoing discussion throughout all of the CNA contract negotiations that any change to the pension would apply to 100 percent of the employees and not be limited to the RNs. Ossen first made this clear to the CNA in June 2002, when the Steelworkers representatives met at the bargaining table. According to Ossen, MHS wanted all MHS employees to participate in the plan because a decision was made early on when MHS was originally acquiring the five hospitals that it only wanted to

[43] Employer's Exhibit No. 26 is an e-mail that Ossen sent to President Arbuckle on December 6, 2002 detailing the changes to the benefit plan that she had set forth orally on December 4, 2002.Ossen testified that under the first bullet, it stated, "this will be for all employees" and that it meant that the pension plan was designed for all employees and not just RNs. Ossen contends that it was meant to encompass all employees in the MHS pension plan.

[44] Employer's Exhibit No. 27.

[45] Joint Exhibit No. 33 is the collective-bargaining agreement, which was ultimately ratified between Long Beach Memorial Medical Center and Miller Children's Hospital and the CNA. The pension plan is discussed on page 48.

administer one pension plan throughout the entire system because of continuity to employee benefits and ease of administration.

According to Ossen, this new pension plan was communicated to all employees, RN and ancillary, at Long Beach Memorial Medical Center and Miller Children's Hospital through "Town Hall Meetings" that CEO of LBMMC and MCH Byron Schweigert conducted on December 11 and 13, 2002 in the Van Dyke Theatre. Ossen attended two or three of the meetings held on December 11, 2002. Ossen claims that the invitation to attend these meeting was made to all employees and that she personally observed fewer RNs then non-RNs at these meetings. She claims that this was due to the fact that the CNA had already had their own employee meetings with the RNs. Ossen claims that she knew the employees present were non-RNs because she personally knew many, and when an employee asked a question, that individual would normally give their name and department. Ossen claims that Schweigert gave a power point presentation during these meetings.[46] The presentation noted that benefit changes would be implemented for all staff, explained the difference between a defined benefit plan and a defined contribution plan, and detailed the new pension plan funding levels. Schweigert also noted that the changes would take effect July 1, 2003 and reiterated that it would be available to all employees. The Hospital also sent out a "Facts Matter" memo dated December 11, 2002 to all hospital employees. The document highlighted the agreements in the CNA contract, and it specifically stated that the new defined contribution plan would be eligible to <u>all</u> employees provided they have the necessary hour requirements.

[46] Employer's Exhibit No. 28 are the overheads for the power point presentation that Schweigert gave employees.

About January 20, 2003, Ossen mailed out a packet to the MHS Finance Committee and MHS Board of Directors in preparation for their scheduled monthly meeting on January 28, 2003. The packet detailed the changes to the pension plan along with a comparison of key retirement provisions from its former plan.[47] Ossen attended the MHS Finance Committee meeting on January 28 where the committee approved the changes and sent its recommendation to the MHS Board of Directors for ratification on January 29, 2003.

Ossen acknowledged that she received Joint Exhibit No. 43 in or about February 2003. The letter was sent out by MHS President Barry Arbuckle to all of the employee's at all five hospitals within MHS and it indicated that the Board had improved the retiree medical plan.

In April 2003, the new Memorial Care Plan Document was completed and replaced the former MERIT plan. Ossen testified that the document was not released until April 2003, because it required a lot of effort to design and redesign a retiree plan. This process involved working with legal "actuaries", information systems, and programming. Ossen testified that the programming entailed a lot of simplification efforts for employees in terms of the plan being changed from fiscal year to a calendar year, employee checks being reconfigured so that all of their hours worked would be available on their check-stubs so they are aware at any time whether they are eligible for a deposit or not, and stubs reflecting exactly what their deposit will be based on their total gross earnings. There are no substantive provisions in this document, which differ from what the MHS Board approved on January 29, 2003.

[47] Employer's Exhibit No. 30.

Analysis:

It is well established that benefits may not be conferred to employees as an inducement to secure employee support of a Board election. General Cable Corp., 170 NLRB 1682 (1986). Generally, an employer's legal duty regarding the determination to grant benefits while a representation proceeding is pending consists of deciding that question precisely as it would were the union not present. Reds Express, 268 NLRB 1154, 1155 (1984). To determine whether granting the benefit would tend to unlawfully influence the outcome of the election, a number of factors are examined: (i) the size of the benefit conferred; (ii) the number of employees receiving it; (iii) how the employees would reasonably view the purpose of the benefit; (iv) the timing of the benefit. B & D Plastics, 302 NLRB 245 (1991). In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive, however, the employer may rebut this presumption by presenting an explanation other than the pending election for the benefit. Noah's Bay Area Bagels, LLC, 331 NLRB 188, 189 (2000). Likewise, an employer may not time the announcement of the benefit in order to discourage union support and the Board may scrutinize the timing of the benefit in and of itself. Mercy Hospital, 338 NLRB 66 (2002). The standard for determining whether the timing of the announcement violates the Act, is the same as the standard for whether the grant itself is unlawful. Id.

I. Employer Knowledge of the Union Campaign

In the present case, the Petitioner contends that the Employer had knowledge of its campaign to organize the ancillary employees as early as April 2002, and that the decision to grant the improvement to the retirement plan was made to deter the

Petitioner's efforts to organize. To support this assertion, the Union mainly relies on the opening of its office 10 blocks away from the Hospital, albeit on the same street, with no evidence to suggest that the Employer had actual knowledge of the office at that time. I find the mere existence of an office, even with a large sign outside, unpersuasive. In order to prove knowledge, one would have to assume that the Employer not only drove on that same street, but did so in the same direction of the sign, for 10 consecutive blocks, and be driving in such a manner as to be focusing on the various business signs on the side of the road, and not on the road itself. There are far too many inferences for this factual proposition to be true. I also find that the distribution of a flyer on or about April 8, 2002 by union organizer Glennis Golden Ortiz insufficient as there was no evidence presented of Employer knowledge.

Although the Petitioner attempted to also establish Employer knowledge as of late August 2002, the evidence adduced was insufficient to establish that any management official derived knowledge at this time as well. In this regard, I do not give any weight to Bill Gallagher's hearsay testimony concerning a management official's alleged posting of Petitioner's Exhibit No. 8 because the Petitioner chose not to present any direct evidence.

In fact, all of the credible evidence into this inquiry reveals that the Employer, by any management level, did not have knowledge of the ancillary employees being organized until October 2002. On this matter, Imaging Services Manager Julie Lane, whom I fully credit, claims to have become aware of the Petitioner's organizing efforts when personnel in her department reported having issues removing union organizer Ortiz from a patient care area. Additionally, Executive Director of Human Resources Ron Chavira credibly testified that he gained knowledge of the Petitioner's campaign at the

beginning of October 2002 when he saw a flyer that someone placed in his chair. Similarly, Petitioner witness Corey Bennett stated that he began to wear and to see employees with union paraphernalia in October 2002. He further noted that in mid-October ancillary employees were still wearing CNA supporting insignia and did not fully make the transition to the Petitioner's "Alliance" insignia until after the first RN strike in mid-October. Bennett's testimony concerning the continued use of CNA insignia corroborates management's assertion that there was much union activity at the facility at that time, and the campaign to organize the ancillary employees was not self-evident.

With respect to the individual who was behind the decision-making process concerning the benefit plan at issue, MHS Senior Vice-President of Human Resources Patty Ossen, the credible evidence revealed that she did not have actual knowledge of the campaign, until November 2002, when she received a copy of the unfair labor practice which alleged that Alliance Organizer Esperanza Leyva was arrested by Hospital security guards.[48] Although the Petitioner argued that the mass distribution of its August 23, 202 flyer clearly established Employer knowledge of their campaign, the record revealed that Ossen does not participate in the daily operational activities of the Hospital, she does not have an office at Long Beach Memorial Medical Center, and therefore does not have occasion to be at the Employer's premises on a daily basis to observe all of the activities that may be occurring at the facility. Therefore, it is plausible that she would not have

[48] Although, in its brief, the Employer argued that receipt of an unfair labor practice does not automatically confer knowledge, Ossen's own testimony indicates that as a result of that charge she derived official knowledge of the existence of the Petitioner. One need not make a huge inference that if the Petitioner's organizer were arrested at the facility, they were engaging in some union activity. Given the fact that the RNs were already represented by a labor organization, the only group left to organize would be the ancillary employees.

been aware of union campaigning as early as August 2002. Further, she credibly testified that during the time period in question, her primary concern and focus at the Employer's premises was the collective bargaining with CNA and the development of the pension plan.

Moreover, even if, as the Petitioner argues, other employer representatives had knowledge of these union flyers as early as August 2002, there was no evidence that they made Ossen aware of the existence these flyers at this time. Although Director of Labor Relations testified that he consistently made copies of flyers that he saw on the Employer's premises and thereafter distributed them to Executive Director of Human Resources Ron Chavira and Patty Ossen, he also testified that he did not recall seeing the August 23, 2002 flyer that the Petitioner distributed.[49]

Likewise, the Petitioner maintains that Ossen knew of the ancillary campaign as early as October 2002. I, however, do not find testimony of Roy Hong regarding the Petitioner's use of the conference rooms believable. In this regard, his knowledge was only indirect and his testimony directly contradicted documentary evidence. Moreover, it should be noted that Petitioner witness Bill Gallagher corroborated Ossen's testimony that there was substantial union activity at the facility in October 2002 due to the RN strike and collective-bargaining between the Employer and the CAN. Therefore, Ossen's assertion of not having knowledge earlier because of widespread union activity at the Hospital is not inconceivable. Accordingly, I find that the Employer learned of the Petitioner's campaign to organize the ancillary employees sometime in October 2002.

[49] Although the Petitioner claims that Berke admitted that he had seen the August flyer, I disagree.

II. The Pension Plan Decision, Timing of Announcement and Alleged Effect.

With respect to the reasons for the change in the benefit plan and the timing of the announcement for said changes, I fully credit Senior Vice-President of Human Resources for Memorial Health Care Services Patty Ossen. I found her to be extremely knowledge of all facets of the decision-making process concerning the changes to the pension plan and unfailing throughout her testimony despite the Petitioner's repeated attempts to discredit her.[50] Additionally, her answers were frank. She consistently looked her questioner in the eyes and no time seemed unnerved. Finally, Ossen's testimony was supported by documentary evidence.

The Petitioner contends that the decision to implement a new pension plan was motivated by the Employer's animus towards the campaign to organize the ancillary employees. However, as described in the previous section, the Employer did not have knowledge of this campaign until, at the earliest, the beginning of October 2002. Nonetheless, the evidence revealed that the decision to change the pension plan began as early as June 2002.

In reviewing facts of the present case, they comport with established legal standards concerning the granting of benefits during a representation proceeding. First, its should be noted that the final decision to improve the pension plan was actually made at the beginning of December 2002, almost two full months before the representation petition herein was filed. However, because the Employer had knowledge of the campaign before December 2002, the decision could arguably be coercive. Notwithstanding, the Employer has compellingly rebutted this presumption. In this

[50] Although in its brief the Petitioner characterized this witness as some sort of acrobat and that her testimony as a whole should be discredited, I disagree.

regard, the unrebutted testimony revealed that three changes were made to the plan from June 2002 through December 2002, and that those changes were based on legislative requirements, documented annual surveys, documented market research, detailed presentations to the MHS Board of Finance and Board of Directors and considerable pressure during collective-bargaining negotiations with the CNA concerning the RNs represented at Long Beach Memorial Medical Center (LBMMC).[51]

Further, the evidence adduced in this case, disclosed that although the benefit conferred was sizeable, the decision for all three changes was not made by any official within LBMMC itself, but instead by the organization to which it belongs, MHS. The changes were not limited to LBMMC, the hospital affected by the Petitioner's activities, but were instituted in all five hospitals within the MHS and applied to all 8,400 employees in that organization. Thus, further supporting the Employer's case that the Petitioner's activities did not motivate the changes in the benefit plan.

With respect to the timing of the announcement, the evidence revealed that the Employer actually announced these changes before the critical period.[52] In this regard, it is uncontradicted that the Employer held "Town Hall Meetings" in December 2002 open to all employees and mostly attended by the ancillary staff, in which it announced the changes to the plan and their applicability to all employees at LBMMC.[53] In this regard, the Employer submitted documentary evidence to substantiate its claim that these meetings took place and that the content was concerning the pension plan. The Employer

[51] In its brief, the Petitioner maintains that except for the changes to the retirement plan in December 2002, the Employer had not made any changes since January 1, 1999. The evidence, however, disclosed otherwise.
[52] Although in its brief, the Petitioner contends that the first announcement to any employees occurred during the critical period, the record revealed otherwise.
[53] The Union did not present any witnesses to rebut this evidence.

held these meetings immediately after the RNs ratified their contract agreeing to the Employer's proposed pension plan. Therefore, although the official notice to employees concerning the changes in the pension plan may have occurred until February 2003, the evidence clearly demonstrates that the ancillary staff was aware that these changes had been made prior to the critical period, in response to changes made as a result of the RN contract negotiations.

To rebut the presumption that the timing of the announcement in February 2003 was coercive or motivated by unlawful reasons, the Employer presented credible testimony that the MHS Board of Finance and Board of Directors did not meet in December and therefore final approval for the changes were not made until their regularly scheduled meeting on January 28, 2003 (still before the critical period).[54] Moreover, it should be noted that the "official" announcement in February 2003 was sent to all 8,400 employees within MHS and was not limited to the ancillary staff at LBMMC. Hence, the fact that the official notice to employees was sent out days after final approval and that all 8,400 employees in MHS regardless of their lack of union activity, further suggests that the Employer did not have the Petitioner's Union organization as a motivation for its announcement.

As to how the employees would reasonable tend to view the purpose of this new pension plan, I do not find that they could have viewed the purpose as an attempt to impede their free choice in the election. In this regard, I do not credit the hearsay testimony provided by several of the Petitioner's witnesses that some employees felt there was no need to vote for the Union in view of the impending retirement plan. In

[54] As noted in the facts section, LBMMC received verbal approval from the MHS Board of Finance in December in order for them to be able to make a substantial proposal during a federally mediated bargaining negotiation session with the CNA.

fact, setting aside the issue of lack of direct testimony, the standard for reviewing conduct as objectionable is an objective one. Hence, the subjective reactions that employees may have expressed to others are irrelevant. That being said, the evidence establishes that employees would not have viewed the changes as an attempt to dissuade employees from supporting the Petitioner because employees were made aware of the changes prior to the critical period, that the changes were partially in response an agreement reached during collective-bargaining negotiations for the RNs, and that the changes were being applied uniformly throughout the MHS system.

Based on all of the above, I find no merit the objection that the Employer instituted and announced an improved pension plan for the purposes of discouraging union support and thereby interfering with employees' free choice in the election. It is therefore recommended that Objection No. 1 be overruled.

Objection No. 2

The Employer, by its supervisors, unlawfully coerced employees to vote in the election.

Objection No. 5

During the election, Employer agents and supervisors kept lists of which voters had voted and which had not, and displayed those lists so that eligible voters would see them.

Objection No. 6

The Employer, through supervisors, managers and agents, interrogated employees during the election about whether they had voted and for which side they had voted. Specifically, this conduct is alleged to have occurred by Employer Agent Julie Hawk, Radiology Supervisor Julie Lane, and Senior Pharmacy Manager Carl Kildoo.

Objection Nos. 2, 5, 6 and 22 will be considered together as they concern

related or similar conduct. Because the incidents involve different individuals and were have alleged to occur in different areas of the Hospital, the allegations are divided by area. The testimony revealed three different incidents as follows: (1) Incident in the Centralized Intravenous Admixture Service Section; (2) Incident in the Cardiac Catheterization Laboratory Department, and (3) Incident in the General Radiology Department.

I. Incident in the Centralized Intravenous Admixture Service Section (CIVAS)

Petitioner's Evidence:

The Petitioner called Corey Bennett to discuss this part of the objection. [55] Bennett has been employed by the Employer as a Pharm Tech II in the Central Inpatient Pharmacy Department (herein referred to as "Inpatient Pharmacy") for approximately 10 years.[56] The Inpatient Pharmacy is composed of three sections, which are immediately adjacent to each other. The first section is the Central Order Entry Area (commonly referred to as "COE"), the next section is the Centralized Intravenous Admixture Service (commonly referred to as "CIVAS"), and the third section is the Pharm Tech Lab (commonly referred to as "PT Lab").[57]

Bennett testified that on March 13, 2003, the second day of the election, at about 2:00 p.m., while he was in his work area (the CIVAS area), he heard Carl Kildoo, the

[55] Bennett, a well-known Union supporter, has appeared in two union flyers.

[56] The Inpatient Pharmacy is located in the basement of the ground floor of the main building of the Hospital. The Outpatient Pharmacy is located one floor above. He testified that of about 50-60 employees in Inpatient Pharmacy, one half (approximately 25-30) are in Unit A, specifically in the classifications of Pharm Tech I, II, and III, and Pharm Tech Leads. All Inpatient and Outpatient Pharmacy employees wear badges, which include purple stripes.

[57] See Employer's Exhibit No. 3, which is Bennett's out of scale drawing of the area. If you are standing in the COE, you cannot see employees in the CIVAS. There is a hallway leading from one to the other that is an open area. PT is an open space, about eight to ten feet wide, which can be accessed by going around the storeroom. You cannot see from the CIVAS area into the receiving area.

Director of Inpatient Pharmacy, in the COE area ask employees *if they had voted and then urged them to go vote if they had not voted*. During cross-examination Bennett noted that Kildoo asked if they had voted and said, *"go vote, you can go vote, go vote."* Bennett testified that although he did not see Kildoo in that area, he heard and recognized Kildoo's voice. Bennett does not know who was in the COE area at that time. Bennett then heard Kildoo speaking to people in the hallway. He does not know who Kildoo might have speaking to. Bennett testified that Kildoo then entered Bennett's work area and stated, *"Corey, I don't suppose I have to ask you if you had voted."* Bennett testified that five to six employees were in the CIVAS area when Kildoo made this comment, of which three to four where Pharm Techs and in Unit A.[58] Bennett then heard Kildoo repeat the same inquiry as he went around the corner to the PT area, where other employees where located. According to Bennett, 12 employees worked around the corner from him and approximately four to five employees were present at the time. According to Bennett, about five minutes elapsed between the first and last time that he heard Kildoo in the COE area.

Employer's Evidence

In response to the allegations presented by Petitioner witness Corey Bennett, the Employer called the Executive Director of Inpatient Pharmacy, Kildoo, to testify. Kildoo oversees both the clinical and distribution operations of the Inpatient Pharmacy for both Long Beach Memorial and Miller Children's Hospital. Although the clinical pharmacists and Pharm Techs do not report to him directly, they do fall under his management. According to Kildoo, there are about 90 to100 employees within the Inpatient Pharmacy,

[58] He could not recall exactly who was present. However there are generally three to four day-shift Pharm techs in that area.

and approximately 40 to 45 are Unit A Pharm Techs. Kildoo testified that the COE would have two to three Pharm Techs depending on the time of day, and CIVAS had approximately seven to eight Pharm Techs. The majority of the Pharm Techs come in to work in the morning.

In his testimony, Kildoo acknowledged that on March 13, 2003, he went into the COE, CIVAS and hallway areas with the intention of reminding employees to vote. Kildoo claims he did not go into the receiving area, but did speak to a couple of employees outside of the CIVAS area. Kildoo stated that he told employees something similar to, *"If anyone hasn't voted, I just want to remind you of your opportunity to vote."* He claims he might have said *"encourage you to vote."* Kildoo testified that he made these comments four times at four different locations within the Inpatient Pharmacy where there were small groupings of employees. One of the places that he stopped at was the CIVAS area where he told Bennett, "Corey, I don't need to remind you to vote." In response, Bennett said, "You don't need to remind anyone." Kildoo claims that he said this because Bennett had been a visible union supporter. According to Kildoo, he was in the entire area less than five minutes. Kildoo claims to have encountered approximately 10 employees during that time span. He did not go back into the area to remind people to vote after that occasion.

Kildoo specifically denied asking employees <u>if</u> they had voted, or directing them to go vote. He further denied being told by the Employer to tell employees to vote "No." Kildoo stated that he did, however, encourage employees to be informed and to vote, but never directed employees how to vote.

II. Incident in the Cardiac Catheterization Laboratory Department ("Cath Lab")

Petitioner's Evidence:

The Petitioner called Patrick Rowan, a Unit A X-Ray Technician in Cath Lab, who stated that there are approximately seven Unit A employees who work in the Cath Lab. According to Rowan, the volume of patients in the Cath Lab is usually heavy. Employees work overtime every day well and into the night. Rowan noted that employees are usually running to get the work done every day and that it is "real busy, very busy most of the time."

Rowan testified that employees have a daily lunch sign-out sheet, which is kept on a clipboard on a window ledge adjacent to the front office of the Cath Lab. The purpose of the sign-out sheet is to inform the lead people of who has gone to lunch and to ensure that everyone gets a break. The sign-out sheet is pre-printed and employees sign next to their name in the time-out box. The lead person for the day, which is normally rotated among the three permanent leads, is responsible for maintaining the lunch sign-out sheet.[59]

Rowan testified that on March 12 and 13, 2003, Julie Hawk, a Unit A X-Ray technician was assigned to be the lead person for the Cath Lab and maintained the lunch sign-out sheet and "the board" on those days.[60] According to Rowan, in the morning, after he returned from voting on March 12, Hawk said to him, *"Oh, that reminds me, I need to make sure that these people go down and vote"; "I need to make sure, you know,*

[59] The three lead persons are usually Lead Nurse Debbie Posie, Cardiovascular Technician Lead (CVT) Edwin McCutchen, and X-Ray Technician Tom Walker. These three individuals are the permanent leads for their discipline. Thus, apart from serving as a permanent lead, they rotate the lead day position.

[60] Rowan claims that Hawk was not assigned to be the lead person for the entire week because she was not the lead person in the days preceding the election. However, he did not work on Friday, March 14, 2003 and as a result does not know if Hawk was assigned to be Lead person that day as well.

whoever needs to go down and vote, goes down to vote." Rowan testified that Hawk also asked him, "Do you know who voted?" Rowan replied that he did not know who had voted yet, but that he had voted. Rowan testified that Hawk then picked up the lunch sign-out sheet and marked off his name with a check mark. She did not write anything next to the check mark. Rowan then heard Hawk ask two people who were in the hallway if they had voted.[61] When they replied that they had not, Hawk stated something to the effect of, *"Well you have to make sure that you get a chance to go down there and vote."* Rowan testified that Hawk asked employees throughout the day if they had voted or not, and if the employee responded no, she stated, *"Well, make sure you go down and vote."* If they had voted, she would mark off their name off on the sign-out sheet. Rowan does not know if Hawk did this on March 13, 2003 as well.

That same day, at approximately 12:00 p.m. or 1:00 p.m., Hawk asked Rowan if there was anybody else that he knew had not voted. Rowan responded that it did not matter because employees could not vote at that time. Later in the day, he looked at the sign-out sheet and saw more check marks on the sheet. He testified that he saw the list with the marks at various times throughout the day and that almost everyone who was eligible to vote had their name checked off. He had never seen similar marks before or after that day.

According to Rowan, the concept of the lead person began several years back. Additionally, there was a time when Manager of Invasive Cardiology Derek Lester attempted to rotate that position around, but within the past year, he decided to rotate the position namely among the three permanent leads.

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[61] Rowan cannot recall who Hawk asked but testified that he thought it was Richard Goo, a Unit B employee, and Jerry Jordan, a Unit A employee.

Rowan testified that to his knowledge, up until March 12, 2003, Julie Hawk had never been assigned to be the lead person in the department, nor had she ever maintained the lunch sign-out sheet. He further stated that she as not been assigned as a lead person after March 13, 2003. According to Rowan, X-Ray Tech Lead Tom Walker and CVS Lead Edwin McCutchen were present on the days that Hawk was assigned as lead. Rowan could not think of anyone other than X-Ray technician Todd Tyler, who had been a rotating lead person within the past year. Rowan stated that he served on rare occasions in this capacity. However, Rowan contends that a temporary replacement is not considered a lead person.

The lead person for the day is assigned by Lester. Apart from maintaining the list, the lead person is also responsible for assigning the work on "the board" to the staff of the Cath Lab. Assigning the work entails manipulating the schedule so that people can have lunches, assigning staff to procedures, and overall juggling the patient and employee flow.

Rowan testified that on the two days in question, Hawk no authority to hire, fire, discipline, or evaluate employees. He further testified that Hawk was hired in or about June 1996 and was among the highly skilled X-Ray Technicians in the department along with regular X-Ray Lead Tom Walker and Manager Derek Lester.

Employer's Evidence:

The Employer presented two witnesses to discuss this allegation: X-Ray technologist Julie Hawk and Manager of Invasive Cardiology Derek Lester.

Julie Hawk

Hawk has been employed by the Hospital for 7 years as a Radiologic Technologist (herein referred to as "RT") in the Cath Lab. According to Hawk, the Cath Lab is a fast paced department. There is no average day and the day tends to shift quickly because cases get added on. The normal operating hours are from 7:00 a.m. to 5:00 p.m. Her direct supervisor is Manager of Invasive Cardiology Derek Lester. Hawk is a Unit A employee, and testified that she has no authority to hire, fire, and issue discipline or review performance of employees.

There is a daily lunch sign-out sheet that is maintained in the hallway outside the little office area close to the scheduling board. When the day is over, the sheet is placed in a drawer somewhere in the Central Scheduling Office.

Hawk testified that there are three leads in the Cath Lab: RN Debbie Posey, CVT Edwin McCutchen, and her lead RT Tom Walker. There is also a "Daily Lead" who is in charge of running the board with assignments for the day. That lead stands at the Board, speaks to doctors, checks up on labs for patients and, if someone is sick, reassigns their cases. Additionally, the lead for the day is in charge of scheduling lunches. There is a 2-hour lunch period during which all employees must get their lunches.

Hawk testified that she has held this lead day position twice. The first time was last year and when she was given the assignment for one week, but was only able to perform for 2 days as Daily Lead because someone in her division called in sick and she

was pulled off the board. She was assigned as a Daily Lead on that occasion because she had not been content with the room she was constantly being assigned to, and she had complained to Lester. Lester told her that he was going to put her in the Daily Lead position so that she could learn a bit more about what goes on in the department. The second time that she was assigned as a Daily Lead position was during the week of the election. She was assigned again because she had complained about being treated unfairly with respect to room assignments. Lester told her that she would perform the lead position for a full week and that perhaps that experience would change her perspective. On both occasions, she did not receive extra pay.

On March 12, 2003, the first day of the election, Hawk went into Lester's office and asked whether she should make sure that everyone had the opportunity to vote. Lester replied, *"Yeah, everybody should be able to get out to vote if they want to."* Lester did not tell her how to ensure that occurred. That same day, first thing in the morning, she saw Patrick Rowan and Rick Daniel and stated, *"Oh you guys voted already."* They said that they had. Then during the course of the morning, she approached each person and asked, *"Do you want to go vote?"* She then offered that employee the opportunity to go vote by replacing them on their case with someone else so they could go vote. Hawk also put a slash mark to the left of their names on the lunch sign-out sheet if they had had an opportunity to go vote.[62] When someone responded that they had not voted, Hawk testified that she then asked, *"Did you want to vote?"* Hawk testified that she freed employees up so that they could vote. She does not recall exactly who, but there were nine people who were relieved in that manner throughout the course of the day.

[62] The only other mark Hawk made on the daily lunch sign-out sheet was the word "no" next to Fred Wofford's name. She made that notation because he told her that he did not want to go vote because he figured he would be contested as he was a new employee.

Hawk testified that on that first day of voting the lunch sign-out sheet stayed in the hallway. Someone else put it away in the drawer of the scheduling office. Hawk stated that she only made marks on the sign-out sheet on the first day of voting because after that day, the sign-out sheet was in the office and she just went into the office to see who had not had the opportunity to vote on the second day. She did not take the list out of the office on the second day. Hawk testified that she did not title the sheet, nor did she ever give it to Lester. Further, she noted that she never told Lester who had said they had voted, wanted to vote, or did not want to vote.

As to who has performed the lead function, Hawk testified that RN Todd Tyler has also been a Daily Lead and has run the Board for a week. Additionally, she noted that RT Patrick Rowan and Rick Daniels, and pretty much everyone has stepped in as to perform the Daily Lead function while someone is out to lunch, or when it is necessary; however they have not been a Daily Lead for the entire day.

Manager of Invasive Cardiology Derek Lester

Lester has served as Manager of Invasive Cardiology (Cath Lab) for approximately three years in September. Seventeen employees report to him including RNs, CVT Technicians, and RT Technologists. Lester testified that normally one of the three permanent leads acts as a Daily Lead. Performing the functions of Daily Lead takes up all of that employee's time. Lester stated that the Daily Lead has no ability to hire, fire, issue discipline, or review employee performance. With the exception of the Lead RN who assists with the evaluations of the nurses, the three permanent leads also do not have these authorities.

Lester testified that there have been other employees who have acted as Daily Leads: RN Todd Tyler and RT Julie Hawk.[63] Lester had tried to assign Hawk as a Daily Lead for a week in the past, but something happened during the course of that week that prevented her from being Daily Lead for the entire week. Lester believes he assigned Hawk as Daily Lead that first time because it was part of his initial plan to rotate everybody through the Daily Lead position as a good learning experience and so that employees could get a good understanding of the department and to learn the impact that the lead had on the flow of cases.

The second time that he assigned Hawk as a Daily Lead was for the week of March 10. He did so because the previous week, Hawk had discussed with him some issues that she was having with the permanent leads. Lester suggested to Hawk that she try the Daily Lead position the following week in order to give her a sense of what leads have to go through on a daily basis. He decided on the week of the election because he looked at the schedule and noted that no one in her discipline was scheduled to be off that week and she could perform the Daily Lead job and still not affect the workflow.

With respect to the election, Lester told Hawk to make sure that everybody had an opportunity to get out and vote. He did not tell her how to go about doing that. Hawk never told him who had voted. Up until the preparation for the present hearing, Lester said that he had never seen any list of who had voted. Lester testified that he does not maintain the lunch sign-out sheet, however, the sign-out sheet is used when computing timecards and reviewing employees' lunch periods in the event a discrepancy exists.

[63] Lester stated that he assigned Tyler to the Daily Lead for a week about a year ago because Tyler was having issues and he thought Tyler could benefit by getting a better understanding of how the department functions as a whole.

III. Incident in the General Radiology Department

Petitioner's Evidence

The Petitioner presented employee witness Leland Hylton to testify regarding this incident. In this regard, Hylton gave hearsay testimony that on March 14, 2003, Debbie Coleman, a Unit A technician in the General Radiology Department told him, "What's up with Julie (Lane), she asked me if I had gone down to vote and I had said that I had not made up my mind yet and she told me, 'just go vote anyway.'" Hylton did not tell anyone in the department about this conversation with Coleman.[64]

Hylton reports directly to Imaging and Services Manager Julie Lane. During the hearing, Hylton was presented with a list by counsel for the Petitioner. The list was purportedly created and marked off by Lane on the days of the election. Hylton testified that he had never before seen this list, until counsel for the Petitioner showed it to him two days before the present hearing.

The Employer's Evidence

Manager of Imaging Services Julie Lane was called to testify regarding Hyland's hearsay testimony concerning Debbie Coleman.[65] Imaging Services consists of several departments including Pediatric Radiology located in Miller Children's Hospital, Vascular Imaging, CT Scan and General Processing, which are located in the Adult Radiology Department on the first floor of the main building, and Nuclear Medicine and Ultra Sound. Lane reports to Terry Ashbi. Lane oversees all of the approximate 70

[64] I am not giving any weight to this testimony inasmuch as the Union chose not to present direct testimony from Debbie Coleman.

[65] The Employer and Union stipulated that Lane is a supervis or within the meaning of Section 2 (11) of the Act.

employees in the above referenced departments. Those employees are considered Technical Staff and were eligible voters in voting Unit A.[66]

Lane testified that she created the document/list shown to her by the Employer the day before the election.[67] The list is a breakdown by section of employees that report to her and which were in the bargaining unit to vote in the March 12th and 13th election. The left column indicates all of the employees that report to her while the next columns reflect the days and hours that these employees were scheduled to work along with their scheduled time-off. Regarding employees who were on vacation, Lane called them, at home and either left a message or told them directly about the voting times and stated, *"If you have a chance to come on…to vote…these are the times you can do it."* Lane testified that she did this because she wanted to make sure that they also had received correct information concerning the polling sessions. The second page of handwriting refers to some of the clerical employees who report to Lead Carmen Paz that Lane had met in the hallway and asked, *"Did you have a chance to go down and vote?"* She subsequently told them the polling times.

According to Lane, if she walked out of her office and spoke to someone either in the hallway or anywhere else, she asked them if they had had a chance to go down and vote. If they replied that they had not, she would tell them the polling session times.[68] Then, either at that time or later, she went into her office and highlighted their names to indicate that she had spoken to them and they were aware of the hours and that they could

[66] The departments include three basic classifications: Nuclear Medicine Technologists, Ultra Sound Technologists, and X-Ray Technologists. Additionally, she has five RNs that report to her.
[67] Employer's Exhibit No. 32.
[68] During direct examination Lane stated that she had shown them the polling times. However under cross-examination, she noted that she had made a mistake on direct and that she in fact never showed them the polling times but instead just told employees about them. I credit her testimony under cross-examination as it appears to have been nothing more than a mistake.

go down and vote. If they said they had, she would go to her office, either at the time or later, and highlight their names as well. After highlighting their names, Lane testified that she did not follow-up with that employee to determine if they had voted.[69]

Lane testified that she did not show her list to any employees. Additionally, she was the only individual that made any highlights or markings on the list. According to Lane, she made all of the notations in her office. Lane testified that she created the list because she wanted to make sure that everybody had an opportunity to go down and vote if they so desired. She kept the list in a drawer inside of her office, which drawer is not open to the staff.

With respect to X-Ray Technologist Debbie Coleman, Lane noted that she had a discussion with Coleman in the morning of March 12. Lane testified that she asked Coleman, "if she had had a chance to go down and vote." Coleman replied that she had not, at which point Lane stated, *"If you would like to go, now is the perfect time because it is not busy. Why don't you go ahead if you wish to go down and vote?"* Lane denied asking her or anyone in her department whether they had actually voted. Lane denied ever telling Coleman, "Just go vote."

Executive Director of Human Resources Ron Chavira

Chavira testified that it was the Hospital's policy to tell employees to make sure that they had a chance to vote. He communicated this policy to the Vice-Presidents of the different Hospital areas and told them to ensure that employees had the opportunity to

[69] Lane noted that she made a notation next to Eric Anue's name because he had come back from voting and told her that he had been challenged. Lane did not ask him why. She made next to Diana Solis' name because Solis had come into her office and told her that Lyland Hylton had contested her ballot.

go and vote. Chavira did not instruct any manager that they should keep a list of who voted and who did not.

Analysis:

A. Agency

With respect to employee supporters of a party, the Board applies common law principles of apparent authority in determining whether a person is an agent of the respondent while that employee engages in alleged objectionable conduct, including making statements. Cooper Hand Tools, 328 NLRB 145 (1999); Allegany Aggregates, Inc., 311 NLRB 1165 (1993). Apparent authority is sufficient to create an agency relationship if the party has created a reasonable belief to other employees that the individual in question has been authorized by the principle to perform the acts in question on behalf of the party. Southern Bag Corp., 315 NLRB 725 (1994). In the present case, the test would be whether, under all the circumstances, the affected employees would reasonably believe that the employee alleged to have committed the objectionable conduct was reflecting the Employer's policy and speaking and acting for the Employer. Waterbed World, 286 NLRB 425-426 (1987).

If the person engaging in the objectionable conduct is not an agent of the Employer, then the actions are accorded less weight "because neither unions nor employers can prevent misdeeds by persons over whom they have no control." Phoenix Mechanical, Inc., 303 NLRB 888 (1991), quoting NLRB v. Griffith Oldsmobile, 445 F.2d 867, 870 (8th Cir. 1972), enf'g 184 NLRB 722 (1970). The Board will overturn an election based on third-party conduct only where the conduct is so aggravated that it

creates a general atmosphere of fear and reprisal rendering a free election impossible. Phoenix Mechanical, Inc., supra.; Westwood Horizons Hotel, 270 NLRB 802 (1984).

B. List-Keeping

The Board has consistently prohibited the keeping of a list, apart from the official list, of persons who have voted in the election. International Stamping Co., 97 NLRB 921 (1951). Notwithstanding, it is necessary to affirmatively show or infer from the circumstances that the employees knew their names were being recorded. Days Inn Management Co., 299 NLRB 735 (1992). Where no such affirmative evidence of this exists or where it cannot be inferred from the circumstances of the case, the election will not be set aside. A.D. Julliard and Co., 110 NLRB 2197, 2199 (1954); Southland Containers, 312 NLRB 1087 (1993); Avante at Boca Raton, Inc., 323 NLRB 555, 557 (1997).

C. Urging Employees to Vote

It has long been held that the mere urging of employees to vote by supervisors acting in a non-partisan manner, unaccompanied by directions regarding for whom the employee should cast his ballot, does not raise material issues with respect to election conduct. In re Pennsylvania Power & Light Co., 66 NLRB 1391, 1392 (1946); (see also Thomas, 111 NLRB 226, where the president of the company urging employees to vote was held not to be unlawful.)

I. Incident in the Centralized Intravenous Admixture Service Section

With respect to the conduct alleged of Executive Director of Inpatient Pharmacy Carl Kildoo, the testimony is undisputed that Kildoo went into that area with the intention of reminding employees to vote in the election. Additionally, the evidence is clear that

Kildoo made comments to approximately 10 employees of which some were in Unit A. The testimony differs only as to whether Kildoo as he claims, stated, *"If anyone hasn't voted, I just want to remind of your opportunity to vote" "encourage you to vote"* or whether as union witness Bennett claims Kildoo asked employees if they had voted and then urged them to go vote if they had not. Bennett further testified to Kildoo stating *" go vote, you can go vote, go vote."*

With respect to what was actually stated during Kildoo's tour of the area, I credit Kildoo inasmuch as his demeanor appeared truthful and forthright. I specifically note that Kildoo was willing to provide testimony without any hesitation, even when disclosing conduct that may have been interpreted as damaging to the Employer. Additionally, his testimony was consistent and unwavering.

Based on the above, and in accordance with legal precedent, I conclude that Kildoo's statements comport with the standards set forth above. In this regard, there was absolutely no evidence that Kildoo directed employees to vote for any specific party or that he campaigned in any way on behalf of the Employer during the alleged misconduct. There is therefore, no evidence that he was doing anything but reminding employees to vote in a non-partisan fashion. Further, his statements to employees at no time forced employees to the polls or suggested retaliatory measures for failing to do so. In light of these facts, I do not find Kildoo's conduct to have been coercive or to support a claim that he interrogated employees concerning how they were going to cast their ballots.

II. Incident in the Cardiac Catheterization Laboratory Department ("Cath Lab")

In regard to this allegation, it is undisputed that at least on March 12, 2003, X-Ray technologist Julie Hawk asked several employees whether they had voted or not, marked their name off on the daily lunch sign-out sheet in an attempt to track whether employees had an opportunity to vote, and that some of these employees saw their name had been checked off. Additionally, it is undisputed that if an employee told Hawk that he/she had not voted, she in turn, told employee to make sure they got a chance to go vote.

In examining whether Julie Hawk's misconduct is indeed objectionable and would warrant the setting aside of an election, it must first be determined whether Hawk was acting as an agent of the Employer when she engaged in the alleged misconduct. In this regard, credit both Hawk and her supervisor Derek Lester, concerning the reasons set forth for appointing her to the Daily Lead position during the week of the election. Additionally, I credit both Hawk and Lester's testimony that Hawk was never instructed by Lester to keep a list of employees who voted or to mark the regular lunch sign-out sheet for the purposes of tracking who had the opportunity to vote. I found both witnesses to be forthright in their manner and in no instance appeared evasive or selective in their memory. Additionally, their testimony was consistent in all aspects and it corroborated each other. Although Lester told Hawk to make sure that employees received an opportunity to vote, this is insufficient to establish that he, in any manner, directed or condoned the questioning of employees or of the marking of the daily lunch

sign-out sheet by Hawk. In support of this point, Lester testified that he had not seen the list or had knowledge of it being marked, until preparations for this hearing. Had he directed the monitoring of employees who had the opportunity to vote on the daily lunch sign-out sheet, a likely inference would have been that he actually inspected that list immediately. However, he did not. Moreover, given the fact that Hawk had only acted as a Daily Lead once before and was attempting to juggle the running of the board for an extremely hectic department with the instructions to make sure employees had an opportunity to go vote, it is even more likely that Hawk made notations on the daily lunch sign-out sheet on her own initiative.

In addition, the record failed to disclose that employees who were possibly affected by Hawk's alleged misconduct, as evidenced by Petitioner witness Patrick Rowan's own testimony, believed that Hawk was acting under the Employer's command or was authorized to engage in any conduct beyond running the board or releasing them to vote. Rowan, himself, noted that Hawk on the day in question, had no authority to hire, fire, discipline or evaluate employees and that she was just acting as a Daily Lead. Therefore, Rowan clearly did not view her as someone with supervisory or any authority for that matter. In light of this evidence, I do not find that Hawk was acting as an agent of the Employer during the alleged objectionable conduct.

Notwithstanding, assuming arguendo that Hawk was an agent in certain aspects, the conduct that she engaged in is not objectionable. In American Nuclear Resources, Inc., 300 NLRB 567 (1990), an employer created a "release-list" of employees to utilize in connection with the election. The names employees were marked off by a supervisor, in the presence of employees, as they boarded a van to be driven to the polls.

Additionally, the employer was required by its contractor to know where its employees are located within the facility. The Board reasoned that because employees were customarily monitored, had knowledge of such activity, and were required to sign a timesheet when exiting the plant, the list-keeping did not have the effect of coercing employees and was therefore, not objectionable. It further held that "checklists can be a legitimate method of keeping track of employees." Id.

Similarly, in the present case, employees in the Cath Lab were required to sign a daily lunch-sheet acknowledging that they were leaving their work area. The list was created because of the hectic workflow of the department and the need to keep track of employees during their only break in the day in order to maintain adequate staffing levels and to ensure that everyone received a lunch break. Employees were well aware that they were required to notify the Daily Lead, by their sign-out sheet, that they were on break and therefore, in another area of the Hospital. Hawk, in turn, utilized this existing list as a tool for releasing voters or to ascertain that they had been afforded the opportunity to leave their work area in order to vote. Therefore, Hawk's intention in making notations concerning which employees had voted was not based on an effort to thwart employees' rights, but rather, was an attempt to give employees the opportunity to vote in light of the hectic pace of the department.

Given the hectic pace of the department, the need to release employees for breaks, the knowledge that all employees had concerning the existing daily sign-out sheet, it is unlikely that employees were somehow coerced by Hawk's notations on the sheet that they had been afforded an opportunity to leave the department in order to vote.

Moreover, there was no evidence that Hawk directed employees to vote for one party versus the other, or that she ever mandated employees to vote. In fact, when she was told by employee Fed Wofford that he did not want to go vote, Hawk's only response was to mark the list with a "no" next to his name. She did not ask him why he did not want to vote nor insisted that he do so.

In light of these facts, I recommend that this part of the objection be overruled.

III. Incident in the General Radiology Department

With respect to this allegation, I fully credit Manager of Imaging Services Julie Lane. Lane was unguarded, frank, and non-selective in her memory. Furthermore, she willingly and candidly answered all questions directed at her by both the Employer and the Petitioner.

With respect to the issue of list-keeping, although Lane admitted to creating a list of eligible voters in order to ensure that all employees under her supervision had an opportunity to vote in the election, there was absolutely no evidence that employees knew that Lane was recording their names. In this regard, Lane credibly testified that she did not show the list to any employees and that the list was maintained at all times in her office. Union witness Hylton reaffirmed Lane's testimony, as he noted that he had no knowledge of the list prior to this hearing. Because there is no evidence of the list being viewed by employees, I do not find Lane's keeping of a list objectionable.

In regard to the Petitioner's allegation that Lane interrogated employees, Lane readily admitted that she spoke to employees on the floor and called employees who were absent at their home and asked, "Did you have a chance to go down and vote?" Lane then advised employees of the polling sessions. The record further revealed that Lane at

no time asked employees if they had actually voted or told employees to go vote.[70] Additionally, there was no evidence that Lane advocated a particular party when she approached employees to inquire whether they had had an opportunity to go vote.

In light of these facts, I do not find that Lane's conduct was objectionable.[71]

Based on all of the above, I find no merit to the objections that the Employer coerced employees to vote in the election, unlawfully kept lists of voters, interrogated employees about whether they voted and for which side they had voted. Inasmuch, it is my recommendation that Objection Nos. 2, 5, and 6 be overruled in their entirety.

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[70] I do not give weight to Union witness Leland Hylton's testimony concerning Lane's conversation with Unit A technician Debbie Coleman. As noted previously, Coleman was not present at the hearing to provide direct testimony concerning this alleged incident.

[71] Although in its brief, the Petitioner cited Neese Contracting, Inc., 2002 WL 31306601, at 8 (NLRB Div. Of Judges) for the proposition that supervisors may not urge employees to vote. A careful reading of the case indicates that both the facts and the finding are wholly inapposite to the present case. In Neese, a chief perpetrator of several and "serious unfair labor practices" interrogated an employee on several occasions. The first occasion, the supervisor asked the employee if he knew about the impending election and thereafter told him that he had "to vote in the election or it would be a yes vote for the union." The second and third time, the supervisor interrogated the employee by asking him whether he was going to vote. In it's reasoning, the judge specifically noted that the supervisor had violated Section 8(a)(1) of the Act because the interrogations occurred "in the midst of other serious unfair labor practices" and was part of "an unlawful effort to manipulate the outcome of the election." These other unfair labor practices included threats of discharge for voting for the union and other acts of coercion.

The present case is factually distinguishable as the alleged misconduct by Kildoo, Hawk, or Lane lack the severity of the conduct present in Neese. Neither of these three individuals threatened any employees or remotely suggested to them, as in Neese, the repercussions of not voting. Additionally, their alleged misconduct has not occurred in a campaign where the Board has made a finding of serious unfair labor practices. Moreover neither Kildoo, Hawk or Lane have been categorized as "chief perpetrators" of unfair labor practices so that their alleged misconduct cannot be seen as coercive as the supervisor in Neese.

Objection No. 3

The Employer surveilled, interrogated, intimidated, interfered with, coerced and evicted from the Hospital's property union agents and employees who were hand billing outside the Employer's Hospital. Specifically, that on or about March 11, 2003, Employer security guards approached union agents and employees while they were hand billing and engaged in surveillance of their union activities, and coerced and evicted them from the Employer's property; on or about March 10, 2003, the Employer intimidated union representatives, and on or about February 27, 2003, union representatives were surveilled and the Employer interfered and intimidated employees while they were engaging in union and/or protected concerted activities. [72]

I. March 11, 2003 Incident

Petitioner's Evidence:

The Petitioner contends that the Employer interfered with employee handbillers and union agents, by approaching them as they were handbilling at the footbridge attached to the employee parking lot, surveilled their union activities, and coerced and evicted them from the Employer's property.

The Petitioner presented two witnesses to testify regarding this incident: Employee Peter Andrade and Union Organizer Judy Lawton.

Peter Andrade

Andrade, a Radiation Technician Assistant in the Radiation Oncology, was involved in the union campaign up to the election on March 12 and 13. In this capacity, he passed out union authorization cards, buttons and stickers to other employees. Approximately ½ to 2 months prior to the election, he began passing out union flyers. He did this about one to two times per week. Andrade noted that he always passed out flyers by the footbridge attached next to the employee parking lot because his department is

[72] The Union did not present any evidence concerning the March 10, 2003 allegation. Inasmuch, I recommend that portion of the objection be overruled.

located next to the footbridge and because he was able to see everyone as they were leaving the parking structure. He normally began to distribute flyers at around 6:20 a.m. and ended at approximately 7:00 a.m., at the beginning of his shift.

Andrade testified that employees in the Radiation Oncology Department arrive at work between 6:00 a.m. and 7:30 a.m. The majority of those employees are Unit B. However, there are approximately 5-6 Unit A employees in his department. Andrade testified that he encounters several Unit A employees throughout the course of his day. These include Radiation Therapy Technologists, Radiation Technologist Special Procedure, LVN's, Pharm Techs, and Nuclear Medical Technologists.

Andrade stated that the parking lot located adjacent to the footbridge is the primary employee parking lot in the Hospital. He noted that Unit A employees use this employee parking lot. Andrade also testified that patients do not enter the Hospital through the footbridge because the only way to get into the Hospital from that area is with a badge. Andrade has never seen a patient on the footbridge.[73]

In the weeks leading up to the election, there was typically one guard (which alternated) standing in the first walkway of the footbridge, specifically where the footbridge meets the parking structure, or on the corner of the first bend of the footbridge.[74] He always saw that guard stationed right as you enter the parking structure, but he knew that the guard would always walk back and forth. Andrade saw the guard there every morning even when he was not leafleting. Andrade stated that prior to March

[73] Patients do, however, park in that same parking structure, but on different levels. Visitor parking is located on the ground level of that same parking structure.
[74] Petitioner's Exhibit No. 3 is a photograph, which depicts both the area where the footbridge meets the parking structure and the corner of the first bend.

11; the guard had for the most part acted the same way.[75] Hospital security guards wear a uniform and have a Long Beach Hospital Badge with their name on it.[76]

On March 11, 2003, the day before the election, at about 6:20 a.m., Andrade distributed flyers and stickers along with another female employee to employees who were walking to and from work on the footbridge.[77] Andrade stated that he did not see any guards when he first arrived in that area, however, about 15 to 20 minutes later, 6:35 a.m. to 6:40 a.m., two uniformed guards approached him and the other employee he was handbilling with. The guards stopped and stood about three feet next to him and the other employee and faced them. [78] The guards did not say anything to handbillers or the employees passing by. They did not tell them to stop leafleting, or to move. Almost immediately, Union Organizer Judy Lawton approached the guards and told them to move. She stated that they were violating their NLRA rights; however, the guards refused to move from that spot. According to Andrade, the guards had been there for a minute or two before Lawton spoke to them. About 5 to 10 minutes after speaking to the guards, a supervisor came out to speak to Lawton. The supervisor was wearing a Hospital Identification badge and a dark blue uniform. Andrade believes that he was still standing in the same area on the bends when Lawton spoke to the supervisor and after that conversation, Lawton moved him and the other employee across the street in front of the Hospital's Main entrance.[79] The guards remained in the same location.

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[75] Organizer Judy Lawton corroborated that prior to March 11, a single guard was usually posted in this fashion.

[76] It is unclear from the testimony whether the guard stationed at this location also wore the same type of uniform. Later testimony from Employer witnesses describes two colors of uniforms for guards.

[77] Petitioner's Exhibit Nos. 4 and 5

[78] Petitioner's Exhibit 6 is a map drawn by Andrade of where he was standing in relation to the guards on March 11.

[79] This is inconsistent with Lawton's testimony who testified that she immediately moved the handbillers after she spoke to the guards.

Before the guards arrived, about 80 percent of the 60 to 100 employees that walked by were accepting the flyers that he and the other employee were distributing. Of these employees "maybe 30" were Unit A employees. Andrade testified that before the guards arrived, he kept on running to Lawton to get more flyers to distribute because he continually ran out of them. Andrade does not know exactly how many employees he passed out flyers to, but does know there were many. According to Andrade, after the guards arrived, that number dropped substantially. Andrade testified that employees appeared not to want to acknowledge them or the flyers they were distributing. He believes the number of employees who accepted the flyers dropped to 30 percent or 40 percent. As employees passed, many said, "No." The employees no longer made eye-to-eye contact with Andrade, were looking down at the ground, and were not taking anything from him. Additionally, employees had to walk around the guards to get through the passageway. Andrade testified that even people that he knew were union supporters were not taking flyers in the guards' presence.

Andrade testified that on that day, Unit A employees used the footbridge because he saw some Nuclear Medical Technologists, several LVN's, employees from Radiology Oncology and the Pharmacy Area passing through. According to Andrade he was specifically keeping an eye out for employee badges to make sure that he did not give flyers to employees who were ineligible to vote. He does not know how many Unit A employees passed by after the guards arrived.

Judy Lawton

Lawton is a CNA Organizer and Labor Representative. In relation to the organizing campaign for the ancillary employees, she was responsible for certain departments in the Hospital: Respiratory Therapy, The Women's Department, Pharm Techs, and Rehab. She was responsible for targeting a large percentage of the Unit A employees rather than those Unit B or C. These Unit A employees included Respiratory Therapists, Pharm Techs and LVN's. Approximately 250 employees that she was responsible for organizing were in Unit A.

Lawton began assisting the campaign on December 23, 2002. She began distributing flyers the first week of January 2003. She distributed flyers once a week and as the date of the election approached, at the beginning of February, she leafleted twice a week. According to Lawton, she often stood at the edge of the footbridge in front of the main area of the Hospital. She targeted that area to distribute leaflets because it was area where the largest number of employees entered the Hospital. This was due to the fact that the majority of employees parked above the ground level in the parking structure attached to the footbridge. Not all Unit A employees entered through the footbridge.

On March 11, 2003, at 6:20 a.m., Lawton went to the bench area in front of the footbridge near the entrance to Radiation Oncology to distribute flyers to organizers and employees. She stationed employees Peter Andrade and Mary Bailey at the footbridge to distribute flyers. She then went directly across the street from them facing in their direction. The single security guard that was normally stationed in that area was not present. At about 6:35 a.m. or 6:40 a.m., she saw two guards position themselves beside Andrade and Bailey and directly face them as they handbilled.

She immediately approached the guards told them they should not be standing there and that it was intimidating to employees. Lawton told them that they had never had a problem with guards before and they had always stood at the first bend of the footbridge. She asked them to move and they refused. Lawton then told them that they were violating the Section 7 rights guaranteed under the NLRA and she took a notebook and asked for their names. They refused to give her their names and she asked to speak to their supervisor. They were both wearing light brown/green security guard uniforms. This was the same color uniform that the one guard wore daily. She noticed their badge was turned over. From the backside, the badge looked like a regular Hospital Badge.

After this exchange, she asked the handbillers to move with her across the driveway until she could speak to the guards' supervisor.[80] Lawton testified that she moved Andrade and Bailey because of the effect that any confrontation with the security guards would have on them. Andrade and Bailey then moved 30 to 40 feet from where they were previously stationed. The guards remained in the same area and observed them distributing flyers until 7:10 a.m.

Between 6:35 a.m. and 6:40 a.m., there were Unit A employees entering the Hospital to go to work. Employees entering or exiting the hospital had to go around the guards. After the guards stationed themselves, the number of employees taking flyers dropped by half. Lawton testified that she knew this because she was in charge of re-supplying the handbillers with materials and she had been replenishing materials very frequently before the guards stationed themselves. After the guards arrived, she was no longer replenishing the handbillers as often with materials. Lawton claims to have also

[80] There was no evidence that employees heard this exchange between Lawton and the two uniformed guards.

seen employees' reactions and that they refused to accept the leaflet or sticker and instead turned away. Lawton does not know exactly how many Unit A employees passed through the footbridge from 6:35 a.m. to 7:10 a.m.[81]

At about 6:45 a.m., the guards' supervisor, Farica Muhammad, came out from the main entrance of the Hospital. Lawton explained to Muhammad what had occurred and asked if the guards would move. Muhammad responded that no one was going to tell them where they could stand on their own private property.

The Employer's Evidence

Director of Security Marion Vinton testified on behalf of the Employer. In this regard, he denied having knowledge of any incident on March 11. Vinton testified that during the time period from January through March 2003, the Hospital employed 20 in-house security guards and approximately 35 contract security guards. There are two Security Supervisors and two Lead Security Officers. The leads are Kim Ansaldo and Farica Mohammed. Neither of these leads has the authority to hire, fire, suspend, or evaluate employees. In addition, these leads have basically no authority to issue discipline and may only do so in a situation where something needs to be corrected immediately.

Vinton also testified that there is normally one security guard stationed in the employee parking structure connected to the footbridge and on the footbridge. This is considered the same post and it is a 24-hour a day assignment. That guard is responsible for patrolling the parking structure.

[81] During cross-examination, Lawton noted that between 6:20 a.m. to 7: 00 a.m., about 100-150 people passed by. She estimated that maybe 50 to 70 employees passed by between 6:20 a.m. to 6:40 a.m. and 50 to 70 from 6:40 a.m. to 7:00 a.m. and that roughly one third of all these employees were in Unit A. The 1/3 estimate was based on her seeing Unit A employees stopping to talk to organizers.

Vinton testified that Hospital security guard uniforms are dark navy blue whereas contract security guards wear a light beige shirt and dark trousers. Both Hospital guards and contract security guards are required to wear the same Hospital identification badge with emergency codes on the back of their badges. Both types of guards are required to show their identification so that their picture and name are visible.

II. February 27, 2003 Incident

Petitioner's Evidence:

The Union called Rosa Maria Miranda, to testify regarding the alleged surveillance of union agents on February 27, 2003. Miranda is a CNA Organizer who was helping to organize the ancillary employees at the Hospital. From January 2003 through the date of the election, Miranda went to Hospital about 3 to 4 times per week. After February 27, 2003, she went to the Hospital more frequently.

On February 27, 2003, Miranda went to the Hospital at noon/lunch time. She was scheduled to meet with a worker at 1:00p.m. She entered the Hospital through the Miller Children's Hospital entrance, walked through the waiting area towards the vending machines to get coffee, and then looked towards the Miller Children's waiting area, which is located at the front of the Hospital entrance. Miranda was looking for Francisco Arago, another union organizer. Miranda testified that she saw Arago and then attempted to follow him down the hallway towards the front of the hospital. Miranda was doing this as she was trying to quickly sip her lidless coffee and walk fast enough to catch Arago. She testified that her vision was then blocked by a big man walking in front of her. [82] The man in question was a dark skinned African American, heavy set, over six feet tall and wearing baggy long shorts/short pants with a Hawaiian Luau shirt. As Arago

[82] Point #1 on Petitioner's Exhibit No. 31.

was walking towards the exit, she noticed that the same man sped up his pace and this action caught her attention. Likewise, it appeared to her that the man was following Arago's path. As she got closer to the man, she saw him put his hand to his ear and she heard him say, *"leaving the hospital."* She saw him holding something but could not identify what kind of equipment he was holding. At that point, she "figured" that "maybe" he was following Arago.

Miranda then proceeded to walk faster and passed the man as he stood talking between the double doors of the exit.[83] According to Miranda, the man stopped at that point, but she continued on to see Arago. Miranda then continued to pursue Arago outside of the Hospital and when she was close enough, she told him not to look back , not to talk to her, and that she thought he was being followed. She proceeded ahead of Arago, called him on the cellular phone, and told him to meet her on the other side of the coffee stand located outside of the Hospital.[84] As she and Arago were speaking, she saw the man again. This time he was in an area behind some bushes and near another Hospital exit. Miranda testified that there was another exit in that area, along with some bushes and valet parking. Miranda asked Arago to look at the man, at which point Arago told her that the man looked like a security guard.[85] Miranda claims that she saw the man looking in their direction. She was standing 20 to 30 feet away from the man.

About 1 minute passed between the first time that she saw the man and where she left him at the exit doors.[86] In that minute, Miranda could not say exactly how many people she saw in the hallway or whether or not she saw any employee from Unit A.

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[83] Point #2 on Petitioner's Exhibit No. 31.
[84] Point #3 on Petitioner's Exhibit No. 31.
[85] The Union did not present Francisco Arago to testify.
[86] Point #1 and Point #2 on Petitioner's Exhibit No. 31).

That day, she claims to have seen employees from radiology. because she noticed employees with radiology badges. However, she could not tell how many employees she saw, nor could she distinguish whether she saw LVN's as opposed to some other employees. She admitted to not looking at the employees' identification. Additionally, Miranda testified that it was a busy day and that the area tends to be a busy place where people wait to be seen by the clinic. Miranda did testify that she saw employees on a normal basis in that area.

Miranda testified that she had never seen that man before and that she never saw him again after that incident.

Employer's Evidence:

Director of Security Marion Vinton testified that the Employer employs one undercover guard, David Hardy. Hardy has been an undercover guard for six out of his 15 years of employment. Hardy is an African-American with medium complexion. He works Monday through Friday and does not work on the weekends. He normally wears khaki pants, polo shirts and a windbreaker jacket to work. Vinton has never seen him in a Hawaiian shirt or wearing shorts. Vinton noted that if he did, he would send Hardy home as this does not comply with the dress code. Vinton testified that Hardy has never been assigned to follow union organizers.

Analysis

I. March 11, 2003 incident

It is well settled that when employees are conducting their activities openly or near company premises, open observation of such activities by the employer is not unlawful. Roadway Package System, 302 NLRB 961 (1991) (no violation where

manager stood for 30 minutes by guardhouse, visible to all, observing handbiller's efforts to distribute pro-union literature; by time of incident the employees had openly engaged in handbilling activity for about 2 ½ months.) Unless the Employer is actively engaged in photographing employees, note-taking, conversing with union representatives, visibly disrupting any contact with the union, or impeding access, the Board will not find a violation of the Act. Days Inn Management Co., 306 NLRB 92 fn. 3 (1992).

The uncontradicted evidence into this incident disclosed that two contract security guards approached employee handbillers and stood within three feet of them while they distributed flyers and stickers.[87] The evidence revealed that the guards did not take notes, did not photograph employees, did not impede employees from accepting flyers, did not talk to the handbillers or to passing employees, and did not ask the handbillers to move or to cease the distribution of their literature. At most, the guards stood and faced the handbillers, for about a minute or two, as they conducted the exact same union activities that they had engaged in for over two months. This is confirmed by both union organizer Judy Lawton and handbiller Peter Andrade's testimony. Lawton immediately removed the handbillers to another area, about 30 to 40 feet away from the guards. Thereafter, the guards continued to observe the handbillers from a distance.

First and foremost, the mere observation of union activity by contract security guards, even if three feet away, for a period of a minute or two, without any other overt action is insufficient to warrant the setting aside of an election. Although the close proximity might arguably interfered with an election if it occurred over a prolonged length of time, and was accompanied by other conduct, the fact that the action lasted less

[87] Although the Employer argued that these security guards were not regular employees, but rather contract guards, I find that they were agents of the Employer at the time of the alleged misconduct.

than two minutes makes it clear that the impact to voters had to be *de minimus* at best. In this regard, although much evidence was introduced concerning impact to Unit A employees who may have witnessed the guards standing three feet away from the handbillers, I find that evidence to be unpersuasive. It is simply not possible that a large number of employees passed within the time span of two minutes, that these employees were Unit A employees, and that the number of employees accepting handbills dropped substantially because the guards stood next to the handbillers.

The Petitioner argues that the entire incident, beginning with the guards standing next to the handbillers to their observation of handbillers 30 to 40 feet away, was objectionable. However, even if the number of employees who were passing by the handbillers in their new area dropped by 30 to 40 percent, it cannot reasonably be attributed to the presence of guards 30 to 40 feet away. There was no evidence again that those guards attempted to dissuade employees from accepting flyers or that they did anything but observe the handbilling which was occurring in the open and on the Employer's property. The inference can just as easily be made that the drop in acceptance of handbills was due to the different location of the handbillers. Furthermore, the Petitioner's witnesses both testified that a security guard had been positioned within view of the handbillers on previous occasions and there was no evidence presented that such observations had any impact on the Petitioner's ability to leaflet.

With respect to the allegation that the employee handbillers and union agents were evicted from the Employer's property, the evidence into this inquiry disclosed that at no time did the security guards ask the handbillers to move from the footbridge or to

cease the distribution of union flyers. In fact, union organizer Judy Lawton herself removed the employee handbillers from that area.

In light of the circumstances, I recommend that this part of the objection be overruled.

II. February 27, 2003 Incident

The evidence presented was insufficient to establish that the individual that Union witness Rosa Maria Miranda saw was in fact a security guard or an undercover guard employed by the Hospital. The only evidence submitted was that a man appeared to be following union organizer Arago and that he stopped at the entrance/exit doors and spoke into some sort of device stating, "leaving the hospital." There was no evidence that he was referring to Arago leaving the hospital as Miranda inferred. Moreover, Miranda who purportedly spent many days at the Hospital organizing employees, had never seen the man before or after this alleged incident. In fact, one could easily have inferred from this same set of facts, that the man was merely a patient or a visitor at the Hospital. Furthermore, although Miranda claims that Arago believed this unknown man was a security guard, the Union failed to call Arago to testify regarding his first hand knowledge of the identity of this individual.

Even assuming the unidentified man had been observing the presence of non-employees organizers inside of the Hospital, there is no evidence that employees would have been aware of such conduct.

Although the Petitioner, in its brief stated that the man was later "behind some bushes," this is an inaccurate account characterization of the testimony given by Miranda. Contrary to the depiction, he was not lurking behind some bushes. Rather, Miranda

observed the man in an area where there is another hospital exit and valet parking. That area is behind some bushes.

Inasmuch as there is insufficient evidence to substantiate that the Employer was surveilling Arago or that such conduct was known to any of the voters, I recommend that this part of the objection be overruled.

Based on all of the above, I find no merit to the Petitioner's allegation that on or about March 11, 2003, the Employer surveilled the union activities of employee handbillers or that it evicted them and union agents from their property. Additionally, I find no merit to the allegation that on February 27, 2003, the Employer surveilled union agents. It is, therefore, recommended that the objection be overruled in its entirety.

Objection No. 4

> **The Employer, in the presence of employees, through agents, supervisors and independent contractors, physically assaulted and battered union agents. Specifically, that on or about March 7, 2003, Marion Vinton, the Employer's chief of security, shoved union representatives; and during the critical period, Manager Debbie Guerrero mocked, intimidated, and interrogated employees because of their appearance in a union flyer; and also for other union activities in which they were engaged.**

Petitioner's Evidence:

With respect to this objection, the Petitioner only presented evidence concerning the assertion that on or about March 7, 2003, the Employer, through Marion Vinton, shoved union representatives.[88] In support of its position, the Petitioner called Glynnis Golden Ortiz.

[88] The petitioner did not present any evidence concerning the allegation that Manager Debbie Guerrero mocked, intimidated, and interrogated employees because of their appearance in a union flyer and for engaging in other union activities. As a result, I recommend that this part of the objection be overruled.

Ortiz, an organizer for the California Nurses Association, testified that on March 7, 2003, at 3:54 p.m., she entered the Hospital through the Labor and Delivery entrance and went directly to the elevator where she pushed the button to go downstairs. Seconds later, a man later identified as Marion Vinton approached her and placed himself between her and the elevator. Vinton asked her where she was going and she replied that she was going to the cafeteria. He told her that she was not going to do that, to which she stated that she was. He then said, "No you are not. You are going to meet somebody." Ortiz testified that Vinton then pushed her left shoulder. According to Ortiz, Vinton further stated, "No, you are going to meet somebody, and this is private property. You can't come in here." Ortiz testified that she did not want to cause a disturbance because she was aware of employees in the area and therefore she walked outside. Ortiz claimed this incident "probably" lasted less than ten minutes.

Thereafter, Ortiz realized that she had not written down Vinton's name and title and she returned for that information. Vinton showed Ortiz his badge. This interaction lasted less than two minutes. She noted that during this second interaction with Vinton, there were employees around, but she was focused on getting his information and thus could not recall who, where, or how many employees were present at that time.

Ortiz claimed to have gone to file a police report at a police station and was unable to submit a report because the officer with the correct rank was not present at that time. She never returned to file the report. According to Ortiz, she and the Union decided to prioritize because of the impending election, and as a result opted not to file a report at that time.

During cross-examination, Ortiz testified that Vinton did not cause a physical injury to her. When asked whether Vinton used force on his hand when he put his hand on her shoulder, she stated, "He touched my shoulder."[89] When asked whether she felt pain during Vinton's alleged touching, Ortiz was primarily non-responsive and reluctantly stated, "I wouldn't characterize it as pain." Ortiz declared that she could not recall if the touching lasted more than a second and that it was probable.

Additionally, Ortiz testified that many employees use the Labor and Delivery entrance as their main entrance to the Hospital. Many of these employees are Unit A employees, specifically employees who work in radiology. Further, she stated that at the time of the incident, there would have been a shift change at 3:30p.m., but that many times employees did not get out until 3:50p.m., 4:10 p.m. or sometimes 5:00p.m. Ortiz, however, declared under cross-examination that she could not recall if there were any Unit A employees present during the first interaction with Vinton.

Employer's Evidence:

The Employer called Director of Security Marion Vinton to address the March 7, 2003 incident. Vinton testified that on March 7, he stopped Union Organizer Ortiz and asked her what she was doing and whether she had business at the hospital. She replied that she did not and he told her that she needed to leave. Ortiz then stated that she wanted to go to the cafeteria. Vinton replied that, that was not an entrance to the cafeteria. According to Vinton, this was a 30 second interaction. When asked if he touched Ortiz' shoulder, he firmly replied, "absolutely not." In this regard, he stated that he was sure of this because the security department has instructions not to touch people. Vinton also declared that Ortiz was very obedient and left the facility. She did, however, come back

[89] This characterization contradicts her earlier testimony of having Vinton "shove" her shoulder.

to get his name. At that point, he held up his identification badge for her to see. He claims that interaction lasted 15 seconds. He did not recall if there were any employees present at that time.

Vinton stated that the Labor and Delivery Entrance leads to the Labor and Delivery Area and the Cardiac Department and that employees, patients and patient visitors use this entrance. He testified that this particular entrance is not a regular access point to the cafeteria. Rather, the regular access point to the cafeteria is located on the Southside of the Hospital through the Main Lobby.[90] Vinton did, however, note that it was possible to access the cafeteria from the Labor and Delivery Entrance by taking the elevator to the ground floor.[91]

Analysis:

I do not credit Ortiz' testimony with respect to the allegation that Chief of Security Vinton physically assaulted and battered her. Furthermore, her testimony contained both internal and external inconsistencies. In this regard, Ortiz initially testified that Vinton "shoved" her shoulder yet during cross-examination, her testimony changed to Vinton having "touched" her shoulder. Moreover, Vinton adamantly denied that he touched her in any way and specifically noted that it was security policy not to touch individuals. Additionally, she stated that the interaction lasted probably less than ten minutes, however she noted that Vinton approached her within seconds and she left because she did not want to cause a disturbance, thereby implying that she was swift to end the interaction. The length of this interaction is simply incredible considering the

[90] In support of this objection, the Employer submitted through Vinton, several pictures of the elevator doors where the alleged incident occurred along with pictures of the ground level area through where Ortiz would have gone to the cafeteria. See Employer's Exhibit No. 10(a) through (c) and Exhibit No. 11 (a) through 11(c).

[91] This is the route that Union Organizer Ortiz was presumably taking.

timing of Vinton's arrival, the few words that were exchanged, and her own stated concerns. Furthermore, it exceedingly contradicts Vinton's own assessment of the length of the interaction. Moreover, I found Ortiz' overall demeanor to be evasive.[92]

Additionally, I found Ortiz to be unreliable in her testimony as to whether any employees were in the area during her first interaction with Vinton. With respect to this allegation, she stated being aware of employees being around and as a result did not want to cause a disturbance. However, her testimony was based on employees normally using the Labor and Delivery entrance, or Unit A employees working in radiology. She also noted that a shift change would have occurred at the time of the incident thereby causing employees to be in that area. However, this information was not based on what she actually saw the day in question rather on past observations. That there could have been employees in that area or more importantly there might not have been any. She was simply unable to specify. Nevertheless, even if employees were in the area during the incident, Ortiz could not recall if Unit A employees, the unit at issue, were present at all.

Notwithstanding all of this, even assuming there were employees in the area, there is simply no evidence that any Unit A employee actually witnessed the brief interaction between Ortiz and Vinton and were, therefore, coerced in any way.

Based on the above, I recommend that Objection No. 4 be overruled in its entirety.

[92] She continuously appeared to mock the questions being asked of her by both the Employer's counsel and of the undersigned by rolling her eyes, looking up at the ceiling, and smirking. Likewise, she answered in a contemptuous manner.

Objection No. 17

During the critical period, the Employer imposed discriminatory, retaliatory, coercive, interfering and intimidating conditions and restrictions on union agents and employees who were soliciting and attempting to solicit union support among employees on the Employer's property.

The Petitioner's Evidence:

The Petitioner's evidence for this objection consists of the evidence provided in Objection Nos. 3 and 4. The Union contends that the Employer imposed discriminatory conditions on employee handbillers as they solicited employees on the footbridge on March 11, 2003 by stationing two security guards next to the employees. In regard to Objection No. 4, the Petitioner maintains that Director of Security Marion Vinton's eviction of Union Organizer Glennis Golden-Ortiz as she was attempting to solicit employees on March 7, 2003 constituted interference with the Union's right to organize employees.

The Employer's Evidence:

The Employer's response to this allegation consists mainly an explanation of its property rights and policy concerning solicitation on its property.

Director of Security Vinton testified that as part of his duties he is required to safeguard the Employer's property and provide a safe environment for patients, visitors, and employees.[93] Vinton stated that the Hospital is open to individuals who have

[93] Vinton also testified that he has been the Construction Manager at the Hospital for the past 12 years. In this capacity, he oversees any physical improvements to the property for example new construction or re-modeling. In this regard, Vinton testified that he is familiar with the property boundaries of the Hospital, including the private versus public nature of the streets and structures. His knowledge is based on his responsibilities as a Construction Manager. He described what streets he thought to be private versus public and noted them on Employer's Exhibit No. 8. The Petitioner objected to the introduction of this testimony based on the Best Evidence Rule of the Federal Rules of Evidence. The undersigned allowed the testimony and the introduction of Vinton's description of what constitutes public and private boundaries. See Transcript pages 640 - 660.

business there, employees, physicians, patients and visitors of patients, and authorized vendors and contractors. The Hospital is also open to the general public but the access is limited to people who have business there. In addition, Vinton testified that those areas closed to the public include patient care areas and those departments that require restrictions due to confidential concerns or environmental issues.

Vinton testified regarding the Employer's Solicitation Policy.[94] In this regard, he noted that the Hospital does not allow any solicitation whatsoever; this includes the distribution of any flyers. He stated that Union organizers are restricted to the cafeteria and are allowed to walk through the Main Lobby to access the cafeteria. He further noted that Union organizers are not treated any differently than any other solicitor. Vinton testified that employee organizers, on the other hand, do not have these restrictions and are allowed to engage in solicitation when they are not working, in patient care areas, or with other employees that are on the clock. Vinton noted that the Hospital's response to solicitation on its property is to stop it immediately by sending a security guard and asking the party to discontinue its conduct. Vinton claims that this response is applied uniformly.

Analysis:

In connection with this testimony and with any Employer argument concerning property interests, the Petitioner submitted California State Penal Code and trespass statutes.[95] It further argued in its brief that the Union had a right as per California and Board law to organize employees within hospital premises, and that any trespass or property interest argument was inapplicable in otherwise lawful union activity. Although

[94] Employer's Exhibit No. 9 is the Employer's Policies and Procedures and No-Solicitation Rules.
[95] Petitioner's Exhibit Nos. 43 and 44.

both parties have submitted case law in their briefs concerning the lawfulness of the Employer's solicitation policy and stance concerning non-employee union handbillers on hospital property, that issue is of secondary relevance to the issue of objectionable conduct during a representation proceeding.

Rather than prove that conduct was unlawful under the Act, an objecting party need only show that the alleged conduct "reasonably tend [ed] to interfere with the employees' free and uncoerced choice in the election." Baja's Place, 268 NLRB 868 (1984); Avis Rent-A-Car System, 280 NLRB 580, 581 (1986).

I. March 11, 2003 Incident

As I noted under Objection No. 3, the evidence disclosed that the guards who engaged in the alleged misconduct never asked the handbillers to leave the footbridge where they were distributing pro-union material nor to cease their union activities. Additionally, they did not attempt to dissuade employees from accepting the handbills. Moreover, the incident occurred not on the day of the actual election, where one might reason that employees would have been intimidated, but one entire day before. Although the guards refused to move from that area and the Petitioner subsequently chose to relocate the handbillers, this is insufficient to establish interference with the Union's activities.

More importantly, as I noted in Objection No. 3, the impact to Unit A employees who may have witnessed the guards standing next to the employee handbillers was *de minimus* as the length of the incident lasted no more than 2 minutes. It is, therefore, unlikely that employees were substantially coerced so that to impede their free choice. Therefore, I recommend that this portion of the objection be overruled.

II. March 7, 2003 Incident

As discussed in Objection No. 4, there was no credible evidence that the Petitioner's organizer was assaulted or that any Unit A employee was in the area at the time of the alleged incident to observe the brief interaction between Ortiz and Vinton. Hence, it is immaterial here whether the Employer ultimately evicted Ortiz for genuine and lawful trespass concerns. Rather, what is of consequence is that no employee was at the incident in order for his or her free choice to have been affected. As a result, I recommend that this objection be overruled in its entirety.

Objection No. 7

> **The Employer threatened to count the approved absence of employee Estella Cohn, who attempted to attend a representation hearing in this matter, as an unexcused absence, and to reflect it as such on a disciplinary attendance review, and followed through on that threat. The Petitioner specifically alleges that Supervisor Suzie beach told employees that they were not to talk with the Union before they spoke to someone at the Hospital, interrogated employees about their union activities and disciplined employees for attending the scheduled pre-election hearing to which they had been subpoenaed.**

Objection No. 9

> **During the critical period, Employer supervisors and agents interrogated employees about their support for the union and other protected concerted activities. The Petitioner alleges Supervisor Suzie Beach interrogated employees about their union and other protected concerted activities.**

Objection Nos. 7 and 9 will be considered together inasmuch as they concern related or similar conduct. In regard to the present objections, the Union contends that the Employer unlawfully counted Estella Conn's absence in order to attend a pre-election hearing as unexcused, and subsequently issued a disciplinary action for that

absence. The Union further contends that Communications Manager Suzie Beach interrogated employees concerning their union activities by a voicemail that she left for Conn on February 14, 2003.

Petitioner's Evidence:

The Union called employee Estella Conn to testify concerning these objections. Conn is employed at Long Beach Memorial Hospital as a PBX Operator in the Communications Department. Although employed in Unit B, as a PBX Operator, Conn interacts with everyone at the Hospital including technicians (Unit A employees). She supplies information to any and all departments. The Communications Department is located in the basement next to Security.

Conn testified that on February 13, 2003 at approximately 10:00 p.m. or 10:30 p.m., shortly before she was scheduled to start work that night, she received a subpoena to testify at the NLRB pre-election hearing, which was scheduled at 9:00 a.m. the following day. Conn was scheduled to the graveyard shift that same night from 11:00 p.m. until 7:00 a.m. and she subsequently called her department to notify that she would be absent. Conn spoke to operator Jackie Clark and told he that she needed to contact Supervisor Suzie Beach to notify her that she had been subpoenaed and would not be able to work that night. Conn was put through to Beach's extension and left a voicemail where she restated that she had been subpoenaed and would not be in to work. Additionally, Conn called back ½ hour later and Clark told her that she had explained to Beach that Conn had "called out." She testified that she "called-out" because she felt she needed to sleep before the Hearing.[96]

[96] Conn is 63 years old. She testified to recently having poor health.

On February 14, Conn arrived at the NLRB office at 9:00 a.m.[97] When she arrived at her home that evening at approximately 6:00 p.m. or 7:00 p.m., she had a message on her machine from Manager Beach. The message stated:

> *"…Call me as soon as you can. I need to know what is happening. You left a message stating that you had been subpoenaed by the Union, but what does that mean? I mean, does that mean all CNA Union, the CNA or Steelworkers are trying to unionize here? What is going on? You should not go in and talk to anyone before you talk to somebody here at the Hospital…"*[98]

In regard to this voicemail, Conn testified that she told all of the employees in her unit, Unit B, concerning the voicemail. She, however, did not tell any other employee outside of her department about the voicemail that Beach had left for her.

Two days later, February 16, Conn left a copy of the subpoena underneath Beach's door. On February 19, at approximately 7:00 a.m., Beach gave Conn a disciplinary action and told her that the hearing would be her sixth unscheduled absence.[99]

Conn testified that she told anyone that asked her about the NLRB hearing, that she was written up for attending the hearing. She recalls telling employees that belonged to the following classifications about her discipline: Respiratory Care, Nuclear Medicine, Ultrasound, Radiology, and LVN's in the Emergency Room. Conn testified that employees would approach her and comment, "I am an LVN or a Tech" "I work in

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[97] I take administrative notice that Conn did not testify because the parties reached a Stipulated Election Agreement.

[98] Petitioner's Exhibit No. 22.

[99] Conn also gave testimony concerning another disciplinary action that Beach gave her concerning unscheduled absence in April 2003, which date is outside of the critical period. The Union proffered this information in an attempt to establish discriminatory motive against Conn. Specifically, Conn testified that during this incident, once Conn had provided Beach with a Doctor's note excusing her absences, Beach tore up the disciplinary action form and stated, "You are not out of the Woods Yet." The Union maintains that this comment demonstrated that Beach was "out to get" Conn in retaliation to her Union activities. In response, Beach denied making that comment and further denied making any reference to the Union or the pre-election hearing during this second disciplinary action against Conn.

Ultrasound" "I saw your picture" in a union flyer, and then asked her if she was a union representative. Conn testified that she would reply that she was pro-union, but was disciplined for going to the Hearing. Conn stated that this happened about a dozen to two dozen times before the election. Conn was unable to recall specific individual names that she told this to, but claims to have told some Unit A employees, as well as Unit B and C employees. She noted that she did not keep track of how many Unit A people she spoke to about being disciplined.

Conn noted that the Employer's Time-Off Policy says that employees can be off to "serve as jurors or witness." [100] With respect to the Hospital's policy concerning unscheduled absences, Conn testified that she was to attempt to contact her supervisor two hours before the scheduled shift

Conn further testified that she overheard Beach "half a dozen" times tell other operators that she would give them overtime but to be aware that if they voted for the union, she would have to go by seniority and they would not received overtime. Conn contends that the first time Beach said this was at the end of September 2002. Between January 30 and March 13, 2003, Beach said this maybe three times. [101]

Employer's Evidence:

The Employer presented two witnesses to rebut the Union's contentions: Suzie Beach and Jonathan Berke.

Communications Manager Suzie Beach

Beach has been the Communications Manager for approximately 5 years. She oversees the daily activities of PBX operators and information desk staff in the Main

[100] Employer's Exhibit No. 32 is the Employer's Attendance Policy.
[101] This specific conduct was not alleged anywhere in the objections. Moreover, the alleged threats occurred in Unit B.

Lobby. All of her employees are in Unit B. Beach testified that from December 8, 2002 through March 1, 2003, Estella Conn was scheduled to work the graveyard shift, which hours are from 11:00 p.m. to 7: 00 a.m.[102] Only two employee are staffed on the graveyard shift.

Beach testified that the Hospital's Attendance Policy states that an employee may only have five unscheduled absences and 10 unscheduled tardies in a 12-month rolling calendar year. According to Beach, the term "unscheduled" means anything not pre-approved by the manager without distinguishing the actual reason for the absence. For example, if an employee "calls out" sick, that absence is counted as unscheduled. After the sixth unscheduled absence, an employee is issued a written disciplinary warning.[103]

To not count an absence as unscheduled, the employee needs to give the manager as much notice as possible. Beach testified that there was no set time limit in writing and that the determination to count an absence as unscheduled for lack of notice would depend on the circumstance and she would have to seek guidance from Human Resources. Beach considers the norm for calling absent to be at least 2 hours before the start of the shift. Beach testified that she determines whether she will approve time-off based on coverage issues. According to Beach, her staff generally gives her 24 hours of notice.

According to Beach, she verbally counseled Conn for excessive unscheduled absences on February 4, 2003. At that time, she issued Conn an Attendance Update Sheet, which indicated that Conn had reached the limit of allowed unscheduled

[102] The Employer submitted staffing schedules for this period of time. Employer's Exhibit No. 17 (a) through (c).
[103] Beach noted that in the past six months she has issued written disciplinary notices to Estella Conn, Ruth Clark, and Carol Yinquez for reaching the sixth unscheduled absence mark.

absences.[104] On February 13, 2003, Conn called in approximately 40 minutes before her shift was scheduled to begin and stated that she would not be attending work. According to Beach, when Conn initially called in, she did not state the reason for her absence.[105] Beach claims that she then had to find someone to cover for Conn.

Beach testified that when she arrived the next morning to work, February 14, 2003, she had a voicemail from Conn stating that she had been subpoenaed and was therefore not going into work. (The voicemail had apparently been left the night before.) Beach testified that she called Conn to see what was occurring because she was unaware of a subpoena until she listened to Conn's message that morning. [106] Beach then consulted with Human Resources Director Jonathan Berke because she had never dealt with a subpoena and did not know how to proceed. Berke contacted Beach later that same day and advised her that the absence was an unscheduled one and to proceed with the disciplinary warning. Beach testified that Berke indicated that other employees had been subpoenaed and had scheduled the time-off with their managers two to three days ahead of time. Beach testified that as of this date, she had still not seen the subpoena.

The following Wednesday, Beach met with Conn and told her they needed to speak concerning her attendance because "they needed to put her back on track." Beach told Conn that her absence put her over the limit and as a result she was issuing Conn a written disciplinary notice.[107] Beach claims that she did not say anything else to Conn

[104] Page 2 of Employer's Exhibit No. 6.
[105] The Employer submitted a Call off Form that staff completes when an individual advises he/she will be absent. The form indicates that Conn did not state a reason for her absence when she initially called in.. Employer's Exhibit No. 18.
[106] This is the same message that Conn testified to earlier. Petitioner's Exhibit No. 22.
[107] Employer's Exhibit No. 6.

during this meeting. Beach denies telling Conn that she was being disciplined for attending the NLRB hearing.

Beach testified that Conn never told her that she received the subpoena from the Petitioner, or did Beach inquire. Beach stated that, assuming Conn had received the subpoena at 10:00 p.m. on February 13, 20023, the only way she could have avoided receiving an unscheduled absence was if Conn had actually worked her scheduled graveyard shift.[108]

In response to Conn's allegations that Beach threatened Unit B employees, but which were not alleged as an objection, Beach denied telling anyone in her staff that if the Union were voted in, she would not be able to give them overtime or shift changes. She further denied telling employees that if newer employees were hired, they would be lower men on the totem pole. Beach denied telling employees that they would be sorry if they voted in the Union. She acknowledges stating that Union contracts are negotiated and certain items such as overtime are handled by seniority and if it was negotiated in the contract. She specifically noted to her staff that in the RN contract, time off was granted by seniority,

Director of Labor Relations Jonathan Berke

Berke confirmed that Beach advised him that she had an employee who had called right before her shift and said that she had been subpoenaed. Beach asked Berke if he knew anything about the subpoena, and what course of action she should undergo given the lack of notice. Beach specifically asked him whether she should count the

[108] During Cross-Examination, Beach noted that in her five years as manager, she did not recall any employee calling in less than one hour before their shift because of something "coming up", not during the scheduled shift, but rather, immediately after the shift ended so that the employee might need to sleep during the scheduled shift.

"call-out" as an unscheduled absence. Berke told Beach that he would have to discuss the matter with Executive Director of Human Resources Ron Chavira and would get back to her. Thereafter, Berke and Chavira concluded that the absence should be counted as unscheduled because of the lack of notice given to Beach. Berke then contacted Beach and told her to count the absence as unscheduled. Berke testified that no other employee who was subpoenaed to testify at the Hearing had their absence counted as unscheduled.

Analysis

I. Unexcused Absence and Disciplinary Action

The test for evaluating a party's pre-election conduct is an objective one. "The law is clear that the subjective reactions of employees to alleged threats are irrelevant to the question of whether there was in fact objectionable conduct. [R] ather, the test is based on an objective standard." Cambridge Tool Mfg., 316 NLRB 716 (1995).

The uncontroverted evidence revealed that Conn called to notify her supervisor of her absence 40 minutes before the start of her shift. This was in non-compliance with the notification practice and standards of her department. Moreover, the evidence adduced disclosed that absences which are not pre-approved by management are classified as unscheduled. The testimony, which was supported by documentary evidence, further indicates that Conn had accumulated 6 unscheduled absences and as per the Employer's established Time and Attendance Policy, called for disciplinary action. Conn was warned of this possibility just one week before the incident in question.

Although the Petitioner argued that the absence should never have been counted as unscheduled because of the issuance of the subpoena. The fact remains that Conn received a subpoena to testify on February 14 and not on the evening of February 13, which she was scheduled to work and for which she "called-out." The law is clear that a federal subpoena excuses an employee from attending work, when that subpoena coincides with the employee's work schedule. Accordingly, the issuance of the disciplinary action for accumulated unexcused absences was not unreasonable under the circumstances.

With respect to the contention that Conn's dissemination of information to Unit A employees concerning her discipline, interfered with the election as noted above. The standard is not the employee's subjective view of the employer's conduct. In the present case, Conn erroneously told employees that she was disciplined for attending the pre-election hearing. However, this is merely Conn's subjective interpretation of why she was disciplined and not the actual reason for the discipline. Therefore, it is not relevant to the employer's alleged objectionable conduct. In this regard, the Employer cannot be held responsible for how an employee chooses to interpret a valid and lawful disciplinary measure.

Moreover, even assuming such statements could arguably interfere with the election, I do not find Conn's testimony that she conveyed this information to Unit A employees to be credible. In this regard, I found Conn's assertions ambiguous and unreliable. She stated that she would tell anyone who asked her about the hearing, that she had been disciplined, but she was unable to detail exactly who she told and when she told them. Given the large number of existing Unit A employees, and the number of

employees she claims to have told of her discipline, it is reasonable to assume that she might have recalled at least one name. Furthermore, the Union failed to present even one witness to corroborate that Conn had spoken to them about her discipline.

II. Interrogation Through Voicemail

The Board has held that interrogation of employees is not unlawful per se. In determining whether or not an interrogation violates Section 8 (a) (1) of the Act, the Board looks at whether under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Emery Worldwide, 309 NLRB 185, 186 (1992). Where someone is an open and active union supporter, is questioned regarding their sentiments but the inquiry is unaccompanied by threats or promises, the interrogation is not unlawful. Rossmore House, 269 NLRB 1176, 1177 (1984).

In the present case, it is undisputed that, in response to Conn's "call-out" for her shift, Beach left a voicemail for Conn asking what was occurring, what the subpoena meant, and whether this mean that there was unionization at the Hospital. She further told Conn that she should speak to someone at the Hospital before she complied with the subpoena.

Although it is unclear whether Conn was at that time a known union supporter, the circumstances surrounding the interrogation are not such that the incident would rise to a violation of the Act. In this regard, the interrogation arose out of Conn calling-out because of a subpoena and not by Beach approaching Conn out of the blue with inquiries regarding the Petitioner. Beach credibly testified that she had never dealt with a subpoena issue and was unclear as to what it meant and how to address it. Therefore, the

nature of the information sought was not meant to coerce Conn, rather to clarify why she had received the subpoena and why was missing her shift. Moreover, the evidence failed to disclose that Beach's inquiries were accompanied by any threats. Furthermore, the evidence revealed that Conn did not tell anyone outside of her co-workers in Unit B about this voicemail. Thus, no Unit A employee, was aware of such interrogation and could not, therefore, have been coerced in any way.

In light of these circumstances, I recommend that this objection be overruled in its entirety.

Objection No. 8

During the critical period, at captive audience meetings held by the Employer, the Employer identified and mocked union supporters, and told them to go the front of the room, while all "hard-working" employees should go to the back. The Petitioner contends that during a captive audience meeting on February 13, 2003, Supervisor Marilyn Rodriguez and an anti-union agent of the Employer identified and mocked union supporters.

Objection No. 27

During the critical period, at a captive audience meeting, the Employer, through a supervisor and agent, interrogated and intimidated an employee about the fact that the employee was taking notes, and asked her is she was going to report back to "your union," and further interrogated and harassed the employee about her photograph I a union flyer. The Petitioner specifically alleges that in or about February 2003, Director of Labor Relations Jonathan Berke interrogated and intimidated employees about union/and or protected concerted activities in which they may have been engaged.

Objection Nos. 8 and 27 will be considered together inasmuch as they concern related or similar conduct.

No evidence was presented to support the allegations contained in Objection Nos. 8 and 27. I, therefore, recommend that Objection Nos. 8 and 27 be overruled.

Objection No. 10

During the critical period, the Employer, through supervisors and agents, threatened employees with retaliation for supporting the Union. The Petitioner alleges that on March 6, 2003, Manager Nancy Fleeman threatened employees in retaliation for their support for the Petitioner.

No evidence was presented to support this allegation. Inasmuch, I recommend that Objection No. 10 be overruled.

Objection No. 11

During the election, Employer supervisors and agents entered the polling place several minutes before the voting was scheduled to close for that session, and announced their intention to close the area, and conducted themselves accordingly, thereby interfering with the election. The Petitioner alleges that Employer Representatives Jonathan Berke, Ron Chavira, Nancy Schuttenhelm, and Patti Ossen engaged in such activities during the polling on March 13, 2003.

No evidence was presented to support this allegation. I recommend that Objection No. 11 be overruled.

Objection No. 12

During and before the polling times, on election days, Employer agents stationed themselves at or near the entrances to the polling place and surveilled employees who were preparing to vote or deciding whether to vote, thereby preventing a fair election. Petitioner alleges that on or about March 13, 2003, Management Representative watched employees as they gathered to vote.

Petitioner's Evidence

The Petitioner called CNA Organizer Glennis Golden-Ortiz to testify regarding this Objection. Ortiz testified that on March 13, 2003, at approximately 7:45 p.m., she went to the hospital for the closing the election polls. She noted that it was getting dark at the time that she arrived. She saw a sign outside of the Houssel's Forum, that indicated that the polls were in session, and which led to the lobby adjacent to the

Houssel's Forum where the voting was occurring.[109] She then went to the bottom of the main steps of the Hospital to wait for the polls to close and to meet with union organizers Judy Lawton and Fernando Lozada. Ortiz testified that at approximately 7:50 p.m. or 7:52 p.m., she saw Director of Labor Relations Jonathan Berke and Executive Director of Human Resources Ron Chavira go over and stand next to the sign. She alleged that they were both facing down towards the glass doors of the lobby of the House's Forum. Ortiz was standing about 20 to 30 feet away from Berke and Chavira.

Ortiz did not know whether employees congregated in the lobby area outside of the Houssel's Forum. She stated, however, that you had to walk through the lobby to get inside of the Houssel's Forum. Ortiz testified that you could see into the lobby area from where Berke and Chavira were standing. Ortiz admitted that she did not see anyone attempt to enter the polling area through where Chavira and Berke were standing. Additionally, she noted that the glass doors were not the only means by which to enter the lobby area and admitted that she was unaware if employees were entering through another area of the Hospital.

Employer's Evidence:

The Employer presented three witnesses to testify concerning this objection: Director of Labor Relations Jonathan Berke, Executive Director of Human Resources Ron Chavira, and Patty Ossen.

Director of Labor Relations Jonathan Berke

Berke testified that no one from Hospital management accompanied him to the closing of the polls on March 13, 2003. Approximately 5 to 10 minutes prior to the

[109] The voting was actually inside of the Houssels Forum and not in the lobby area adjacent to it. (Ortiz referred to the building where the Houssels Forum is actually located inside of, as the Houssels Forum itself.)

closing of the polls at 8:00 p.m., he was standing alone at the top pf the steps of the Houssel's Forum. Berke noted that he was standing two to three feet in front of where the easel was located barring management from proceeding.[110] The easel had a sign that said, "Stop, No Management Permitted Beyond This Sign, Election." At about 7:55 p.m., he saw union organizer Lozada accompanied by a woman walking down the steps past him and going down towards the Houssel's Forum.[111]

Berke testified that he stood at this same spot for the entire 5 to 10 minutes prior to the opening if the polls. Additionally, he stated that for most of that time, he was looking towards the parking lot and away from the Houssel's Forum. Berke testified that he did not notice any employees down the stairs or walking by during the period that he was standing in that area. Shortly after 8:00 p.m., Berke went downstairs into the Houssel's Forum to close the polls. According to Berke it was nighttime and dark outside.[112]

Executive Director of Human Resources Ron Chavira

Chavira testified that he did not participate in the closing of the election polls on March 13 at 8:00 p.m. He was at the Hospital that day, but left at approximately 4:15 p.m. or 4:30 p.m. He had dinner and then attended a negotiation class at Cerritos College with Patty Ossen. The class was from 6:00 p.m. to 9:30 p.m. He testified that he did not return to the Hospital after that time.

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[110] Employer's Exhibit No. 15 (b) is a photograph of the exact area that Berke claims to have been standing at the time. Additionally No. 15 (a) through 15(e) depict the entire area which is the subject of discussion. 15 (f) is a photograph taken inside of the Houssel's Forum and facing the steps where Union Organizer Ortiz alleges Berke was actually standing.

[111] He recalls the exact time because he looked at his watch and thought that they should not be proceeding to the election polls before 8:00 p.m.

[112] Employer's Exhibit No. 16 (a) through 16 (c) were taken recently at the request of Director of Security Marion Vinton, and purportedly depicts a nighttime view of the area in question and which is documented in footnote 16. It should be noted again that these pictures were taken recently and not during the week of the election.

MHS Senior Vice-President of Human Resources Patty Ossen

Ossen testified that she did not participate in the closing of the polls on March 13. She further stated that she went to dinner and attended a class with Ron Chavira.

Analysis:

I do not credit Ortiz' testimony. As I noted previously in this report, I found her to be continuously evasive throughout her testimony and did not appear forthright in her answers. Moreover, her testimony directly contradicts the testimony of two credible witnesses whose testimony indicates that Ortiz could not have seen Berke with Chavira that evening. Chavira, who Ortiz claimed to have seen at the site with Berke, was at a class with Ossen, miles away from the incident. In addition, Berke testified that he was alone at the time of the alleged incident. This corroborating testimony indicates that it was not possible for Chavira to have been engaged in any misconduct.

In addition, I find Ortiz' testimony unreliable due to her physical ability to perceive the alleged misconduct. In this regard, by her own admission, it was getting dark at the time she arrived at the scene. She also stated that she was 20 to 30 feet away from Berke and the non-present Chavira, which means that she was even farther away from the Houssel's Forum. The documentary evidence disclosed that one would have to be at the top of the stairs in order to even look down into the Houssel's Forum Lobby area. Ortiz was admittedly not in that area. These factors disclose that she was incapable of accurately perceiving whether or not Berke could see into the Houssel's Forum.

Furthermore, even assuming *arguendo* that Berke was at the top of the stairs looking towards the Houssel's Forum as Ortiz alleged, there was no evidence that employees passed by Berke in order to enter the lobby of the Houssel's Forum or that

they were congregated in the lobby waiting to enter the Houssel's Forum in order to vote. In this regard, I credit the testimony that so that Berke did not see any employee or that he spoke to anyone as he was waiting for the polls to close.

The Petitioner cited Robert's Tour's, Inc., 244 NLRB 818, 824 (1979) quoting *Belk's Department Store of Savannah, Ga., Inc., 98 NLRB 280 (1952)*, in support of its contention that the mere presence of supervisors, even if they were some distance away from the polls and did not say anything coercive to employees interfered with the election. However, both Robert's Tours and Belk's Department are inapplicable to the present case. In Belke, two employees stood next to the door where employees had to exit in order to enter the polling place and checked their names off on a list as they did so. During this same time, supervisors were stationed in the area where employees were gathered while waiting to vote. Further, one supervisor paced back and forth in the space where employees were required to pass through in order to get to the polling place. Robert's Tours dealt only with the issue of list keeping and not with supervisory presence near the polling area.

In the present case, the allegation is that Berke and Chavira were standing at the top of the stairs looking down towards the lobby where the employees would have to pass through in order to enter the voting area. Unlike in Belke's, Berke was not stationed in the area were employees were waiting to vote, nor was he pacing in an area where employee were required to pass through in order to enter the lobby that led to the polling area. In fact, by Ortiz own admission, employees could enter the lobby through doors other than the one that Berke is alleged to have looked down upon from the top of some stairs. Likewise, unlike in Belke's where employees presumably saw their supervisors in

the same waiting area, there is absolutely no evidence that any employee saw Berke. Moreover, as I have already noted, I give no credit to Ortiz' recollection of the alleged misconduct.

In light of these facts, I recommend that Objection No. 12 be overruled.

Objection No. 16

During the critical period, the Employer told employees eligible to vote that despite the presence of "CNA/USWA Healthcare Workers Alliance" on that ballot as a labor organization, the only union that would represent the employee if the union won the election would be the Steelworkers. The Petitioner maintains that employees received flyers where the Employer misrepresented the Stipulated Election Agreement. The Petitioner alleges that these misrepresentations were a threat to interfere with the internal governance of the union and interfered with the election.

Objection No 19

During the critical period, the Employer distributed a flyer, which misinformed employees about the National Labor Relations Act and the Board that a dues check off clause could result in dues being "automatically deducted from employees' paychecks if the Union won by stating, that a dues check off clause could result in dues being "automatically deducted" from employees' paychecks if the Union won. The Petitioner alleges that the Employer in or about February 18 and 20, 2003 distributed such flyers.

Objection No. 20

During the critical period, the Employer, through flyers distributed on or about February 18 and 20, 2003, solicited grievances from eligible voters.

Objection No. 24

During the critical period, the Employer distributed a flyer indicating, and otherwise told employees, that if the union won, the Employer would not be able to accommodate employees' needs for consideration in scheduling and time off, that promotion might be precluded, and that they would lose their confidentiality. The Petitioner specifically contends that the Employer distributed flyers, which stated that they would not be able to speak to their managers to accommodate

employees with regards to their change of shifts and days off if the employees voted for the union.

Objection Nos. 16, 19, 20, and 24 will be considered together inasmuch as they concern related or similar conduct.

Petitioner's Evidence:

The Union called employee Leland Hylton to testify regarding these objections. Hylton testified that on or about February 10, 2003, he received Employer flyer dated February 10, 2003.[113] Among other things, the flyer states:

> *Long Beach Memorial Medical Center and Miller Children's Hospital received notification that the Memorial Alliance, which is made up of the United Steelworkers of America and the California Nurses Association, has filed a petition with the National Labor Relations Board to represent our maintenance, service and licensed technical employees/*
>
> *Ask yourself these questions:*
> *Do I really want to pay dues to be represented by the Steelworkers?*
> *Will the Steelworkers be able to represent my interests?*

He testified that on or about February 17, 2003, he received another flyer from the Employer.[114] This flyer discusses the dates, times and voter categories for the election.

On or about February 18, 2003, Hylton received another flyer from the Employer.[115] Among the items discussed in the flyer are:

> *To be a union member, you have to pay union dues,*
>
> *Even if you don't want to be a member, you may have to pay dues if the CNA/USWA (United Steelworkers) Healthcare Workers Alliance negotiates a Union security Clause, and*
>
> *CNA/USWA (United Steelworkers) Healthcare Workers Alliance dues may be automatically deducted from your paycheck, if the CNA/USWA (United Steelworkers) Healthcare Workers Alliance negotiates a Dues Check-Off Clause…*

Hylton also testified that on or about February 20, 2003, he received a flyer from the Employer. [116] The flyer, which is titled "Advantages of Staying "Union-Free" states

[113] Joint Exhibit No. 8.
[114] Joint Exhibit No. 9.
[115] Joint Exhibit No. 10.

…Retain Flexibility:
Management may lose its ability to treat employees as individuals on various issues, including scheduling, performance-based pay, benefits, and time off due to contract restrictions. Under a union contract, the hospital may not be able to consider individual employees circumstances, but, rather, must observe specific contract terms.

Seniority policies may place limitations on who may be promoted or transferred.

If the Union is elected, employees may lose "independence" and in some cases "confidentiality" if the negotiated contract requires that all matters be raised through a formal grievance procedure.

…Retain Your Voice:
LBMMC/MCH employees can now directly submit any concern or recommendations to their supervisors, administration, Human Resources and the Committee of 300. If the Union is elected as your bargaining representative you may lose your voice in favor of the group….

Hylton received yet another flyer from the Employer on or about February 26, 2003.[117] That flyer states:

Who is the "Alliance?"

The Alliance the Web says,
"<u>The CNA will continue to organize RNs into CNA. The United Steelworkers Association, through its own Health Care Council, will organize other employees…</u>"

<u>The Bottom Line</u>
No matter what the "Alliance" says, if the union is elected, it is the Steelworkers who will represent you – <u>not the CNA.</u>

Can you really afford to allow the union to represent you when it won't even tell you Who it really is?…

Employer's Evidence:

<u>Executive Director of Human Resources Ron Chavira</u>

Chavira testified that the Hospital did not send out different flyers or publication to staff based on their unit (A, B, or C), rather everyone received the same publications. He further noted that the "Facts Matter" publications were not always "run" by him and that it was CEO Bob Schweigert that approved them. Chavira testified that he did not review the publications all of the time before they were distributed.

[116] Joint Exhibit No. 11.
[117] Joint Exhibit No. 15.

Analysis:

Although the Board has fluctuated on its views concerning misrepresentations during election campaigns, in 1982 it reinstated the standard that the Board will neither probe into the "truth or falsity of the parties' campaign statements…" nor set aside an election on the basis of misleading statements. Midland National Life Insurance, Inc., 263 NLRB 127, 132 (1982); Shopping Kart Food Market, 228 NLRB 1311 (1977). Notwithstanding, the Board noted that it would continue to set aside elections when documents are so deceptive that it prevents employees from recognizing the propaganda "for what it is" or where the campaign conduct contains threats and/or promises, which would tend to interfere with an employees free choice. Id. at 131-132. In applying Midland, the Board has held that a misstatement of the law or fact, is not grounds for setting aside an election. John W. Galbreath & Co., 288 NLRB 876, 877 (1988).

The evidence submitted concerning the Employer's alleged misconduct is of the same type that Midland refused to find objectionable. The campaign material that the Employer put forth is not so deceptive in nature that a reasonable employee would not be able to discern that it is merely propaganda. In this regard, there is ample of evidence throughout the record that not only is there an affiliation between the Steelworkers and CNA, but employees were aware that the Healthcare Workers Alliance held an affiliation with these two labor organizations. The Union itself made this known to employees through the distribution of buttons, lanyards and pull-tabs that carried the insignias of both the CNA and the Steelworkers in conjunction with the Alliance insignia. It is therefore highly doubtful that employees would not have been able to recognize the Employer's campaign material as mere propaganda. Additionally, none of the flyers

distributed by the Employer contained any threats, promises, or were coercive in nature. They state that things "may" occur depending on the flux of negotiations but never threatened employees with sure the loss of any benefit.

At most the Employer may be guilty of misrepresentation of fact and/or law, however, this in and of itself is not objectionable conduct. As a result, I recommend that this objection be overruled.

Objection No. 18

The Employer allowed supervisors and managers inside the polling place during the election. The Petitioner claims that supervisors and managers were allowed into the polling area to cast their ballot which ballots were subsequently challenged by the Petitioner on the basis that they were supervisors within the meaning of Section 2(11) of the Act.

Petitioner's Evidence:

The only evidence presented regarding this objection consisted of two employee witnesses called by the Union: Leland Hylton and Judy Lawton.

Leland Hylton

Hylton testified that he acted as a Union observer on March 12, 2003, the first day of the election. He observed the polls from 2:00 p., to 5:00 p.m. and from 6:00 p.m. to 8:00 p.m. Hylton testified that he challenged three to four employees that day. According to Hylton, he challenged the ballots of Ultrasound Lead Tech Diana Solis and Systems Analyst Eric Anue.[118] He could not recall who else he challenged.

[118] The record does not disclose specifically on what basis Hylton challenged these employees.

Judy Lawton

Lawton testified that the Union intended to challenge Ultrasound Lead Tech Diana Solis, Eric Anue, Karen White, Vic Tudo, Linda Cox and Adalin Oderan.[119]

No other evidence was presented to support this allegation.[120]

Analysis:

The burden of proving Section 2 (11) supervisory status rests on the party asserting than an employee is a supervisor within the meaning of the Act. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001). Section 2 (11) of the National Labor Relations Act states:

> "The term "supervisor" means any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action…"

The Board has held that the exercise of any one of the Section 2 (11) primary supervisory indicia is enough to confer supervisory status so long as it is exercised with the use of independent judgment, and is not routine or clerical in nature. Opelika Foundry, 298 NLRB 897, 899 (1986).

In the present case, the evidence presented is insufficient to establish that any supervisors or managers even entered the polling area. In this regard, the Union failed to submit specific and clear evidence of which supervisors or managers they were referring to in their objection, and whether or not these unknown individuals were actual supervisors and managers within the meaning of Section 2(11) of the Act. The mere fact

[119] Similarly, the record does not disclose specifically on what basis these employees were on the list to be challenged.
[120] The Union did not address this objection in its brief.

that Union observers challenged individuals as supervisors or managers is insufficient to establish supervisory status.

Moreover, at most it is alleged that supervisors went inside of the polling area in order to cast their ballot. There is no evidence that these alleged supervisors spoke to anyone while waiting to vote, that they surveilled employees waiting to vote, or even how long they were in the polling area. In fact, there was no evidence of anything remotely improper.

As a result, I recommend that Objection No. 18 be overruled.

Objection No. 22

During the critical period, the Employer polled employees about their preference on how they would vote and specifically, that Supervisor Johanna Mondaca interrogated employees as to their union sentiments.

No evidence was presented to support the allegations embodied in Objection No. 22. Accordingly, I recommend that Objection No. 22 be overruled.

Objection No 23

During the critical period, the Employer, through supervisors and agents, expressed to employees approval of their anti-union stands during work-time, while in working and patient care areas, in the presence of other employees, while denying the same opportunity to pro-union employees and agents. The Petitioner specifically alleges that on or about March 6, 2003, the Employer permitted anti-union employees to pass out anti-union campaign material during working hours, while at the same time denying pro-union employees permission to engage in similar activities.

Petitioner's Evidence:

No direct evidence was presented that on or about March 6, 2003, the Employer permitted anti-union employees to pass out anti-union campaign material during working

hours, while at the same time denying pro-union employees permission to engage in similar activities.

Employee witness Leland Hylton, who testified that his understanding was that discussing the union while on work time was a violation of the Employer's rules, was the only possible evidence that was submitted on this subject matter. He noted that he was confused about this policy because managers could discuss union things to employees but employees amongst themselves were not free to discuss things about the Union during work hours. He testified that Manager Julie Lane engaged in this type of conduct. He, however, was unable to provide the exact dates or times of when Lane engaged in this activity.

I do not credit Hyland's testimony inasmuch as the information he provided was vague. Moreover, he was unable to recollect specific incidents of this alleged activity by Employer Supervisor Julie Lane. This was the only evidence submitted by the Union and it did specifically pertain to the allegation in their objection.[121] Inasmuch, I recommend that Objection No. 23 be overruled.

[121] The Union did not address this issue in their brief.

Recommendation

The undersigned, having made the above findings and conclusions, viewing the alleged conduct individually and cumulatively, and upon the record as a whole, recommends that the Petitioners Objection Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 20, 22, 23, 24 and 27, be overruled. Accordingly, it is recommended that a Certification of Results of Election be issued.[122]

Dated Los Angeles, California, this 25th day of July 2003.

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Tirza P. Castellanos
Hearing Officer
National Labor Relations Board
Region 21

[122] Under the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, exceptions to this report may be fled in Washington, D.C. 20570. Exceptions must be received by the Board in Washington by August 8, 2003.